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# CASES

DECIDED IN THE

# Supreme Court of Ohio

# IN BANK

AT DECEMBER TERMS, 1835, 1836

REPORTED IN CONFORMITY WITH THE ACT OF ASSEMBLY

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# CASES

DECIDED BY THE

# Supreme Court of Ohio,

## IN BANK,

## AT DECEMBER TERM, 1835.

---

PRESENT:

JOSHUA COLLETT,
EBENEZER LANE,
REUBEN WOOD,
PETER HITCHCOCK,
} JUDGES.

---

THE STATE OF OHIO ON RELATION OF A. G. BROWN *v.* ROBERT E. CONSTABLE.

An election for county recorder is illegal and void, if held before the vacancy has actually occurred which it is intended to supply. Such election can only be held at the annual election in October.

RESERVED in the county of Athens.

The case is this: At the November term, 1835, of the Supreme Court for the county of Athens, A. G. Brown, of said county, filed an affidavit, setting forth that at the October election of that year,

he was duly elected recorder for said county; that he had demanded the books, papers, documents, and records, pertaining to said office, of one Robert E. Constable, who had previously holden the office, and who refused to give them up. And upon this affidavit moved the court for a writ of *mandamus*, commanding Constable to deliver over to him said books, papers, etc., or to show cause to the contrary.

This motion was sustained, and a writ issued accordingly.

To this writ the defendant returned, that at the October election, 1832, he was elected recorder of said county of Athens. That he did not take upon himself the duties of the office until July 11, 1833, because that, on July 10, 1826, A. G. Brown had 8] been appointed recorder, *under the then existing laws, for the term of seven years, which term did not expire until July 10, 1833; and the defendant claims the right to hold the office for the term of three years, from and after the time at which he entered upon the discharge of his duties thereof.

To this return there is a demurrer and joinder in demurrer.

NYE, for the relator.

R. E. CONSTABLE, for defendant.

Judge HITCHCOCK delivered the opinion of the court:

Two questions are presented to the court for examination in the decision of this case.

1. Was Robert E. Constable, the defendant, legally elected recorder?

2. If legally elected, at what time would his term of office expire?

In the determination of these questions, we have no other guides than the several legislative enactments on the subject. Previous to the year 1829, county recorders were appointed by the associate judges of the court of common pleas of the proper county, and the term of office was seven years. But on the 11th of February, of that year, a law was enacted, changing the mode of appointment and providing for the election of these officers by the people. The term of office was also reduced to three years. 27 Ohio Stat. 65. By this act it is clear that the legislature did not intend to interfere with those persons then in office. In section 1 it

is enacted, "that there shall be elected by the qualified electors of each county within the state, on the second Tuesday of October *next after the term of service of those now in office shall have expired*, and on the second Tuesday of October triennially thereafter, a recorder for said county," etc. From this it is plain that no election could be holden until after the expiration of the term of service of the then present incumbent—and an election so holden would be void. In order to prevent any difficulty that might happen, in consequence of a vacaney from the expiration of a seven years' appointment, or otherwise, the same law provides, in section 3, that if the office becomes vacant, "the commissioners of the county shall appoint a recorder, who shall hold his office until the next *October election." It is clear that the legis- [9 lature intended that the office of the county recorder, as soon as it could be done consistently with the rights of those in office, should fall in on the second Tuesday ot October, triennially; and that those elected by the people should hold their offices for the term of three years from that date. But they were cautious to provide that there should be no election, until a vacancy had occurred, from the expiration of the term of those in office who had been appointed under the pre-existing law.

Had the election of Constable taken place during the existence of this act, there can be no doubt but the election would have been void; because when he was elected there was no vacancy. Brown had been appointed in 1826, and his term of office did not expire until long after the election of Constable.

This law, however, was repealed on February 25, 1831, and is only referred to as aiding in the construction of the act of this latter date. In section 1 of the latter act, it is provided, "that there shall be elected in each county in this state, on the second Tuesday of October, triennially, a county recorder, who shall hold his office for the term of three years, if he so long behave well, and until his successor shall be chosen and qualified." That is a convenient provision; but still it was not the intention to interfere with the recorders then in office, as is apparent from the proviso to the repealing clause in section 9, which is as follows: "Provided the that recorder elected under the provisions of said act," referring to the act of 1829, "and those theretofore appointed by the associate judges of the proper county, and whose term of service has not expired, shall continue to hold their respective offices for

the term for which they were elected or appointed in the same manner as if the acts under which they were elected or appointed, were not repealed." By this proviso, the laws under which recorders then in office were elected or appointed, was continued in force as far so respected those officers; and it seems clear to my mind, that the law of 1831 was a mere continuation of the law of 1829 so far as relates to the appointment to or duration of the office. Although considerable change is made in the prescribed duties and liabilities of the officer, no change is made as to the election.

10] *It is true this act, in providing for filling vacancies, authorizes the county commissioners to fill such vacancies as occur by "death, resignation, or removal," without authorizing them to fill vacancies in general terms. In this respect it differs from the act of 1829. But it is believed that this was a mere oversight; for at the special session of the general assembly, holden on June 4, 1832, we find an amendatory act providing "that in case the office of recorder in any county is or shall become vacant, the commissioners of the county shall appoint a recorder, who shall hold his office until a recorder shall be elected and qualified." 31 Ohio Stat. 11.

If we are right in the construction of the act of 1831, it follows that the election of Constable was void; being in anticipation of a vacancy which did not occur until the 10th day of July next following the day of election, and not in consequence of a vacancy which had already happened.

The correctness of this construction, so far as relates to an election in anticipation of a vacancy, is strengthened by reference to the "act prescribing the duties of county treasurer," in section 1 of which it is provided that the treasurer, although elected in October, shall hold his office two years from the first Monday of the next succeeding month of June. 29 Ohio Stat. 291. From which it is manifest that where it is the intention that an election should be held in anticipation of a vacancy, that intention is clearly expressed. So in the election of justices of the peace: "when a vacancy is *about to happen*, or shall actually happen," the trustees of the township are required to give notice to the electors of such township to fill such vacancy. 29 Ohio Stat. 167.

It may, perhaps, be though t that the election of Constable being void, his acts performed as recorder are void. But it is not so. He was recorder *de facto*, and the business transacted by him

in the office must be considered equally valid as if he had been properly elected.

The first point being against the defendant, it would seem to be unnecessary to say much as to the second. This, however, would seem to be equally clear against him. Both the statutes of 1829 and 1831 provide, it is true, that the recorder elected shall hold his office for three years, and until his successor is elected and qualified. But from what time? The policy, if not the express words of the law, would indicate that it must be from the day of election. The election is to *be holden on the second Tues- [11 day of October, triennially. If a vacancy happens, it is to be filled until the second Tuesday of the next succeeding October, and on this day the term of service must expire if a successor be elected, or rather so soon thereafter as the successor is qualified. When no day is mentioned in the law from which the term of service shall commence, it must commence from the day of election. Any other construction would lead to this absurdity, that the officer elect would have it in his power to fix the commencement of the term of service for himself and his successor at any time he should think proper to qualify.

It is not so in regard to other offices; why should it be so in regard to this?

It follows that had the election of Constable been legal, his term of service expired upon the qualification of his successor, and he had no right after that time to discharge the duties of the office, or to withhold the books, papers, etc., connected with it.

The demurrer is sustained, and a peremptory mandamus ordered.

---

MIAMI EXPORTING COMPANY *v.* THE HEIRS, ETC., OF J. HALLEY, DECEASED.

*Scire facias* v. heirs and terre-tenants to make lands liable for the payment of decedent's debts.

A debtor dies after judgment against him, subsisting as a lien upon his real estate. The administrator makes a sale, that for irregularity passes no title. The judgment creditor may proceed, by *scire facias*, against the heirs and purchasers in possession, to revive the judgment, and to have execution awarded against the lands.

In 1814 the plaintiff recovered judgment against Joseph Halley and William H. Hopkins, for one thousand five hundred and sixty-three dollars and twenty-eight cents, in the court of common pleas of the county of Hamilton. Halley died in 1816, and administration was granted to David S. Halley, who has no assets from which the judgment can be satisfied. In August, 1823, the judgment was revived against Hopkins as the survivor of Halley, and Hopkins had an execution issued returnable to the December term following, which was returned "no goods, chattels, lands, or tenements of the said Hopkins."

The *scire facias* avers that the judgment remains unsatisfied; that the time allowed for the administrator to settle Halley's estate has expired; that Hopkins has nothing from which the 12] amount of the judgment can be made; and that in *1814, when this judgment was obtained against Halley and Hopkins, Halley was seized of certain lands which were cast upon his heirs by his death, and who with certain terre-tenants are made defendants, and the lands sought to be charged with execution in satisfaction of this judgment.

P. Turpin, one of the terre-tenants, has plead that he is seized of the lands by *legal* title, acquired after the plaintiff's judgment had become dormaut, to wit: on May 7, 1822.

2. That after the death of Halley, and the grant of administration to David S. Halley, in 1817, the administrator obtained an order to sell the real estate of Josiah Halley; and, in pursuance thereof, sold the lands in question to Joseph Ruffner, whereby the premises are discharged from said judgment.

There is a third plea, substantially like the second, but with this addition, that in confirmation of the sale to Ruffner, under the order of court, on July 12, 1817, the administrator executed a deed to Ruffner, *in fee*, whereby the said lands became discharged of the said claim.

The plaintiff has replied, taking issue on all the facts set up in the special pleas.

V. Worthington, for the plaintiff.

Storer and Hammond, for the defendant.

Opinion of the court, by Judge Wood:

This cause is submitted to the court in the place of the jury, and

is to be determined as the evidence shall be found to sustain or not to sustain the issues made by the parties. The defendant has the affirmative; the *onus probandi* is with him, and if the issue made by the replication to either of the pleas is found for him, there is an end to the plaintiff's case.

The proof he offers is an entry on the minutes of common pleas of Hamilton county, made on December 6, 1816, as follows: "On petition and exhibition of the administrators of the estate of Josiah Halley deceased, praying an order for sale of real estate, personal estate being insufficient to satisfy debts due from the estate, court grant the petition, and order a writ to issue agreeably to law, and appoint Ichabod B. *Miller, Stephen B. Davis, [13 and Nathan Hatfield, commissioners or appraisers."

This is the only order made by the court of common pleas in relation to the sale of this property. Under it, the clerk issued his precept to the administrator, dated December 10, 1816, to sell the land. The commissioners were sworn, and appraised the land at three thousand dollars. On January 30, 1817, it was sold by the administrator, and this return made: "By virtue of a special order granted by the honorable judges of the court of common pleas, in and for the county of Hamilton and State of Ohio, I sold on January 30, 1817, the property set forth and described in said order, to wit: one moiety of two hundred and fourteen and one-half acres of land, in Anderson and Columbia townships, county and state aforesaid. The aforesaid moiety was sold agreeably to previous notice, given according to law—sold with the incumbrance of a judgment in favor of the Miami Exporting Company —sold under the supposed amount of principal unpaid of eight hundred dollars, and the interest and costs thereon, and the widow's right of dower, on a credit of ten, twenty, and thirty months, for nineteen hundred dollars."

The defendant also offers in evidence the record of the administrators' deed to Ruffner for the land sold, dated July 12, 1817, but which is executed in the presence of but *one* witness.

To the evidence so offered, the plaintiff objects, and insists that the order made by the court of common pleas is an order to *appraise* and not *to sell* the land, and that no order for a sale could be made until the appraisal was *first* made and returned. There is certainly force in the argument, and the same point was so decided in the case of the Lessee of Goforth *v.* Longworth, 4 Ohio, 130.

The sale, however, in that case was made under the statute of February 10, 1810, section 32 of which provides, that the court shall appoint three disinterested men to "view the land, tenements, or hereditaments so to be sold, and return to court, under oath, a statement of the value thereof, *after which the court shall direct the executor or executors, administrator or administrators, to proceed to sell*," etc.

The sale, in this case, was made under the statute of January 25, 1816, which enacts that the court shall appoint three disinterested men to view the premises, etc., and return to court a state-
14] ment of the value of the remainder of such *lands, etc.; and the court shall direct the executor or executors, administrator or administrators, to proceed to sell, etc. The principal difference in these two statutes is, that the words, "*after which the court shall direct*," etc., in the former, are left out of the latter statute. The practice is believed, however, to have been generally the same under both, and agreeably with the decision in Goforth's Lessee *v.* Longworth. The court of common pleas, on the return of the appraisal, have not unfrequently refused to grant an order to sell, because the appraisal has not been made, in all respects, in conformity with the law. Unless the appraisal is *first* made and returned, costs might be greatly accumulated by a subsequent sale, and all the proceedings, at last, set aside, because of a defect in the appraisal. Besides, the statute provides that so much of the real estate only should be sold as should be found necessary for the payment of the debts against the estate. The provision clearly contemplates an appraisal to be first made and returned; for without it, the court have not the facts to enable them to determine whether *all*, or a *part*, of the real estate must be sold, to liquidate the demands against the estate. It does not appear to us that any alteration was intended to be made in the statute of 1816 in this respect; and if a sale was required by the act of 1810 to be ordered by the court, *after the appraisal was returned*, we can see no reason why it is not necessary under the latter statute.

It is not important, however, that this question should be decided, as another point made determines the case. The *legal title* is not vested in the purchaser at an administrator's sale, until the lands sold are conveyed by deed *duly executed*. It must be *signed* and *sealed* by the grantor; and such signing and sealing must be attested by *two witnesses*, who are by law required to *sign their*

*names to such attestation.* The deed of the administrator to Ruffner is defective; there is but the attestation of *one witness.* The deed, therefore, conveyed no *legal* title to Ruffner, and Ruffner could convey none to Pultney, nor Pultney to Turpin.

The first issue then made, that Turpin is seized and possessed of the lands by *legal title,* is not sustained by the deed offered in evidence. It does not conduce to prove this issue, and should be rejected.

The second issue is not proved. The lands were not sold on an order to sell the real estate, as set forth in the second *place. [15 There was no such order, and the lands were not discharged from liability to satisfy such judgment.

The third issue is not proved. The deed offered in evidence to prove it, is rejected for the want of *another* witness. It follows, consequently, that all the issues are found for the plaintiff. As against Turpin, the lands must be chargeable with the plaintiff's demand, and such appears to us to be the justice as well as the law of this case. The lands were bid in by Ruffner, with a knowledge of, and on the express condition, that they were to be subject to the plaintiff's claim, and such is the language of the deed to Ruffner; and it must be supposed that Pultney, who purchased of Ruffner, and Turpin, who bought of Pultney, had examined Ruffner's title, and had full knowledge of the restriction contained in the administrator's deed.

---

DOE EX DEM. JOHN G. AND GEORGE MCCULLOUGH *v.* WILLIAM LEE.

While the statute of descents of 1805 was in force, if an infant died seized of an estate inherited from the father, leaving neither brother nor sister, the mother, as next of kin, inherited the estate, to the exclusion of the father's sister.

RESERVED in the county of Harrison.

A statement, agreed to by counsel, presents the following facts: Edward Yealhall died in 1813, in Athens township, in the county of Harrison, seized of forty acres of land, situate in said county, leaving Ruth Yealhall, his widow, and an infant child, who died the following year. Elizabeth, the sister of Edward, survived him, and, on the death of the child, claimed the land by inheritance

from her brother, and executed a deed for an undivided moiety to the plaintiff's lessors, under which they claim title.

The widow, after the death of the child, executed a conveyance for the whole lot to the defendant, who claims that by the death of the child, the land ascended to the mother.

BEEBE, for the plaintiff.

DEWEY, for the defendant.

Opinion of the court, by Judge WOOD:

The question is, under this agreed case, whether Elizabeth Yeal-
16] hall, the *sister* of the ancestor from whom the estate *came, or Ruth, the *widow*, and *mother* of the child, inherited the land. This must depend on the statute of February 22, 1805, which continued in force until June 1, 1815, when the act of December 19, 1814, took effect, and repealed some of its provisions.

The statute of 1805, 1 Chase's Stat. 515, sec. 2, enacts, that if the estate came by descent, etc., "from an ancestor, it shall descend to the children of the intestate, or their legal representatives.

"That, if there be no children or their legal representatives, the estate shall pass to the brothers and sisters of the intestate and their legal representatives: *Provided*, they are of the blood of the ancestors from whom the estate came. That, if there be no brothers or sisters, or their legal representatives, the estate shall pass to the *next of kin to*, and of the *blood of the intestate*."

Have we not, then, the very case to which this statute applies? This estate came by descent from the ancestor to the intestate, who died without issue. There are no children, nor their representatives, to whom it can descend. There are no brothers nor sisters of the intestate; and, in the language of the statute, it must pass to the *next of kin to*, and of the *blood of the intestate*. The investigation is limited to the single inquiry, *who is the next of kin to, and of the blood of the intestate?* The *mother*, Ruth, or the *aunt*, Elizabeth.

In 2 Nels. Ab. 1077, 1078, it is said, "Kindred are a certain body of persons of kin, or related to each other; that there are three degrees of kindred, in the English law. One in the right line *descending*, as from the father to his son, and so on to his children in the male and female line, and their representatives. The next is the right line of *ascending*, which is directly upward, as from the

son to the father or *mother*." There being no heirs in the right line descending, it results that the mother stands in the next degree of kin to the intestate, and inherits the estate; for it is the third degree, says *Jacob*, in the *collateral* line, which descends by the brother and his children downward, or by the uncle upward. The title of the mother must prevail over that set up by the aunt; and, consequently, there must be judgment for the defendant.

---

*Henry Reynolds *v.* Thomas Liepер's Heirs. [17

A forfeiture of lands for the non-payment of taxes was incurred during the owner's lifetime, but he died before the sale; the infant heirs may redeem, and without paying for improvements made within two years after the purchase for taxes.

Reserved in the county of Champaign.

This case came before the court on writ of *certiorari* to the court common pleas for Champaign county. The case, as presented by the record and bill of exceptions, was as follows:

In the year 1826, one hundred acres of land, part of survey No. 5,050, in the Virginia military district, and within the county of Champaign, listed in the name of Thomas Leiper, ancestor of the defendants, was forfeited to the State of Ohio for the non-payment of taxes. In the month of May, 1831, Thomas Leiper died, leaving the defendants in error his heirs at law, who are all within the age of majority.

On the 12th day of December of the same year, the said one hundred acres of land was sold by the auditor of Champaign county, charged with the taxes from the year 1826 to the year 1831, both inclusive, and purchased by Henry Reynolds, the plaintiff in error.

At the October term of the court of common pleas, 1833, the defendants, by their next friend, Jacob Baum, having taken the necessary preliminary steps, applied to the court for leave to redeem.

This application was resisted by Reynolds, but was sustained by the court, and an order made "that the land be redeemed,"

and that "the same may be discharged from all right, claim, or lien on account of said sale."

The errors assigned and relied upon for the reversal of this order are:

1. That inasmuch as the forfeiture happened during the lifetime of the ancestor no estate descended upon the heirs, which would authorize them to redeem.

2. That if permitted to redeem, it could be done upon payment for all valuable and lasting improvements.

JAMES, for plaintiff:

1. The applicants were not entitled to redeem; because, by the forfeiture, the former owner was divested of all right to or interest in the property. 23 Ohio Stat. 95.

This forfeiture happening in the lifetime of the ancestor, nothing 18] could descend upon the heirs. The provision in the *act of March 14, 1831, "that if land be sold, the property of any minor, etc., the owner thereof shall have the right to redeem in the manner prescribed by law" (29 Ohio Stat. 297), can only be extended to those who were minors at the time of the forfeiture.

2. But if the living have the right to redeem, they must do it in "the manner prescribed by law;" and no mode has ever been prescribed for the redemption of land forfeited to the state for non-payment of taxes and sold under the forfeiture act. But if the laws prescribing the mode of redeeming land sold for taxes are to be referred to, then the act of 1816, and the supplementary act of 1829, must govern the case, as they were the only laws in force upon the subject at the time of the passage of the act for the sale of forfeited lands; hence, by these laws, the purchaser would be entitled to pay for improvements before surrendering the land.

No argument was submitted for the defendants.

HITCHCOCK, J., delivered the opinion of the court:

By the act of March 14, 1831, the legislature of the state made provision for the sale of all lands which had theretofore, or that should thereafter, become forfeited for the non-payment of taxes. 29 Ohio Stat. 298. Section 6 of the act contains the proviso, "that if any lands shall be sold by virtue of this act, the property of a *feme covert*, minor, or insane person, or person in captivity, the

owners or owner thereof shall have the right to redeem the same in the manner prescribed by law." Unless the heirs of Thomas Leiper are within this proviso the court of common pleas erred in permitting them to redeem. The argument urged to prove that they are not within this proviso is based upon the fact that the land was forfeited during the life of their ancestor, from which fact it is inferred that, although he died before the sale, no interest descended upon the heir. But is this inference well drawn?

It is true that the legislature, in section 15 of the act of February 1, 1825, to amend the "act defining the duties of county auditors," say that when land is forfeited to the state for the nonpayment of taxes, "all the right, title, interest, and claim of the former owner thereof shall be considered divested out of said former owner and vested in the State of Ohio. 23 Ohio Stat. 89. But to the same section is attached a proviso, securing to such former owner or owners the privilege of reinvesting *themselves with the same land upon the payment of all taxes, penalties, and interest that may have accrued at any time prior to the disposition thereof by the state. Notwithstanding the forfeiture, therefore, it is apparent that a valuable interest remained in the former owner—the interest or right to redeem. And we have no doubt that, in the case of the death of the ancestor, this interest would descend upon the heir, and it would be strange had the law been otherwise. Lands actually sold for taxes might be redeemed, and why should not those forfeited to the state be redeemed? [19

By the law of March 14, 1831, before referred to, these forfeited lands are directed to be sold. But still the legislature were unwilling to derive the former owner of all power over the land. In section 4 of this act, they in effect give further time to redeem, until the second Monday of December of that year. Before that day the ancestor of the defendants died, and from the day of his death up to the day of sale, his heirs would have the right to pay the taxes, etc., and prevent the sale. They were disabled, however, in consequence of their infancy, and but for the proviso to section 6 of the act would have been forever excluded. From these considerations we have been brought to the conclusion that they are within that proviso, and of course that the court of common pleas did not err in permitting them to redeem.

It is objected that, if allowed to redeem, it must be done "in the

manner prescribed by law," and that no law has been ever enacted prescribing the manner in which forfeited lands when sold should be redeemed. There can be no doubt that the legislature, in this part of the act, have reference to the general provisions of law authorizing the redemption of lands sold for taxes.

The next error complained of is, that the court of common pleas permitted the heirs to redeem without requiring them to pay for improvements.

In this, too, we believe there was no error. Previous to 1831 such payment was required, but in that year the law was changed. By the "act for the redemption of land and town lots sold for taxes," 29 Ohio Stat. 300 it is provided "that no purchaser of any land or town lots sold for taxes, nor any person claiming under him, shall be entitled to any compensation for any improvement, which he shall make on such land or town lot within two years 20] from and after the sale thereof." *The improvements for which compensation was claimed in this case were made within the two years. But it is urged that this law, although enacted on the 3d of March, did not take effect until the first day of June following, and the law providing for the sale of forfeited lands took effect from its passage, and as this latter law authorizes the redemption "in the manner prescribed by law," the law then in force must have been intended; hence, under that law, the purchaser would be entitled to pay for improvements wherever made. It seems to the court that in this counsel is mistaken. It must be remembered that at the session in which these laws were enacted, the legislature were revising the laws generally. Among other acts they passed one for the sale of lands forfeited for the non-payment of taxes; not only such as have been, but such as should thereafter be forfeited. It was intended that this should be a permanent law. In this law provision is made for the redemption of lands which shall be sold under it, in case the person or persons having the right to redeem shall, at the time of sale, be laboring under certain disabilities. They say such persons "shall have the right to redeem in the manner prescribed by law." By what law? No particular "law" then in force is referred to, but "law" generally. It seems to have been the intention to place the former owners of lands which had been forfeited to the state, and who were laboring under the specified disabilities when the lands were sold, upon the same footing with the former owners of lands sold

or taxes, and to allow them to redeem upon the same terms. And the law in force at the time the land should be sold, must be the law to govern when application was made to redeem.

The order of the court of common pleas affirmed, with costs.

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21] *BANK OF MUSKINGUM v. CARPENTER'S ADM'RS ET AL.

A second witness, added to a mortgage after its execution and acknowledgment, does not affect its equitable validity.

An equitable mortgage is preferred in equity, when of prior date to a judgment lien.

The purchasers of real estate from executors or administrators, under an order to sell for the payment of debts, where the sale is regular, and the title perfect, hold such estate discharged of liens; but the proceeds of sale are subject to the priorities of lien attached to the land producing such proceeds.

The settlement of an estate by the court, and the distribution directed by such court, is not conclusive on the rights of creditors.

A creditor having a lien on one fund only, may call upon a creditor having a previous lien on the same fund and also upon another, to exhaust first the one not subject to the creditor's lien. But where the proceeds of either fund have been appropriated in good faith, equity will not interfere to disturb such appropriation.

THIS cause was adjourned here for decision from the county of Muskingum.

The bill and amendment state, that between November 18, 1814, and January 20, 1815, complainants discounted sundry promissory notes, on which Emanuel Carpenter, jr., was liable, amounting to eight thousand seven hundred dollars; all of which remaining unpaid on August 14, 1816, they applied to him to secure the payment of the notes by mortgage on real estate; that he mortgaged to them a parcel of land in Fairfield county, containing five hundred and fourteen acres, conveying the same to D. J. Marple, in fee, with a defeasance executed by Marple, providing that the conveyance should be void on the payment of the notes, within three months; that in receiving the conveyance, Marple acted as trustee only, and had no interest; that the deed

was executed by Carpenter, in the presence of Wyllys Silliman and Thomas Fricker, who witnessed it; that the deed was acknowledged by Carpenter before said Fricker, a justice of the peace, and recorded; that in recording the deed, the recorder omitted to record the name of Fricker as a witness; that complainants afterward commenced suit in the common pleas of Fairfield county against Carpenter, on two of the notes, to wit: the two thousand dollar and the fifteen hundred dollar notes; and at the November term, 1817, recovered judgments on the first for two thousand three hundred and twelve dollars and fifty cents, and costs; and, on the other, for one thousand seven hundred and thirty dollars and seventy-five cents, and costs; that all the said notes remain unpaid, except one thousand nine hundred dollars on the four thousand and five hundred dollar notes, which was collected from one Loveland, who was a party to said two notes; that at the time the said judgments were rendered, Carpenter was seized in fee of the land described in the mortgage, and also of other lands in Fairfield county, particularly described in the bill; that Carpenter died about February 1, 1818, seized of all the lands described in the bill, possessed of a large personal estate, and debts due to him, but insolvent; that about February 15, 1818, Samuel Carpenter and David Carpenter (who are made defendants as representatives and individuals), were appointed administrators of the estate of E. Carpenter, jr., disposed of all 22] the goods, and collected debts to a large amount, and *neglected to collect part of the debts, by which a loss accrued to the amount of four thousand dollars.

That at the time of the execution of the mortgage and the death of Carpenter, all the lands were clear of incumbrance, except by three judgments in favor of the Bank of Chillicothe, rendered in August, 1816, for one thousand five hundred and fifty-three dollars and sixty cents and costs; one thousand one hundred and seventy-eight dollars and forty-three cents and costs, and one thousand five hundred and nineteen dollars and fifteen and one-half cents, and costs; and that Carpenter, in his lifetime, about March 10, 1817, paid the judgment for one thousand one hundred and forty-eight dollars and seventy-three cents, and one thousand one hundred and twenty-eight dollars and thirty cents, on the one thousand five hundred and nineteen dollars and fifteen and one-half cent judgment; that at the time complainants recovered

their judgments, the lands were clear of incumbrance, except the unpaid judgments in favor of the Bank of Chillicothe; and that the administrators received the sum of eight thousand dollars in a judgment and mortgage given by him to the said Emanuel in his lifetime.

That at the time of their appointment, the administrators had actual notice of all the before-stated facts, and that about June 10, 1818, complainants gave notice to the administrators that the said notes and judgments were unpaid, that the said Emanuel had executed the mortgage, and that the complainants would look to the estate generally, and to the lands particularly, for the payment of the said notes and judgments; and that such demand has been from time to time renewed.

That on July 20, 1820, the administrators, having obtained an order from the court of common pleas for that purpose, sold the lands described in the mortgage, to divers individuals, as follows, to wit:

| | | |
|---|---|---|
| Lot 3 to Frederick A. Foster, for | $155 | 62½ |
| Lot 7 to John Creed, for | 135 | 00 |
| Lot 1 to W. W. Irvin, for | 168 | 98½ |
| Lot 2 to W. W. Irvin, for | 297 | 50 |
| Lot 4 to W. W. Irvin, for | 180 | 40 |
| Lot 6 to W. W. Irvin, for | 135 | 00 |
| Lot 8 to W. W. Irvin, for | 1,159 | 24½ |
| Lot 5 to Irvin & Creed, for | 150 | 31¼ |
| Aug. 17, 1823, Lot 12, to L. & J. Clark, for | 1,649 | 00 |
| Sept. 29, 1827, Lot 9, to Noble and Clark, for | 907 | 33⅓ |
| " " Reversion of Lot 14 to Noble and Clark, | 1,361 | 25 |
| " " Reversion of Lot 10 to George Ring, for | 141 | 19 |
| " " Reversion of Lot 11 to George Ring, for | 150 | 38 |
| Oct., 1828, Reversion of Lot 13 to James Rice, for | 295 | 92 |

*And a short time after Creed purchased, he sold lot No. 7 to [23 Samuel Effinger, and that some other transfers have been made. Complainants do not know how much of the purchase money has been paid, and make all the purchasers defendants, and charge them with notice of the preceding facts. Marple died in 1822, his heirs, and the heirs of Emanuel Carpenter are made defendants. That since the death of Carpenter, the administrators have sold the other lands for four thousand dollars.

The particulars respecting these sales, complainants are unable to state. All the other parties to the notes are insolvent.

The charging part of the bill and amendment also puts in issue the facts, whether the purchasers of the land mortgaged had notice of the mortgage and judgments before the payment of their purchase money; whether Fricker witnessed the mortgage at the time it was executed or afterward, and whether any settlement of Carpenter's estate was made by the administrators, and that if made, it was after the time for settlement had expired, and complainants had no notice, and that the administrators pretended to the court, at the settlement, there were other judgments having a prior lien to the mortgage and judgment of complainants.

*Prayer.*—That the purchasers of the land, contained in the mortgage, may be decreed to hold the same as trustees for complainants; that the said land stands charged with and liable for the payment of said notes; and that if the judgments in favor of the Bank of Chillicothe are paid, that complainants may be substituted to their lien on the lands not contained in the mortgage; that the administrators pay to complainants all the moneys they have received on the lands sold, with the interest; that the purchasers pay the balance of the purchase money remaining unpaid; that all the securities, taken by the administrators for such balances, be assigned to the complainants, and that the administrators pay them a dividend of the personal estate, to appoint a receiver and for general relief.

Noble and Clark answer, deny notice of the mortgage and judgments at the time of their purchase and paying five hundred dollars of the purchase money, and offer to pay the balance as the court may direct.

Frederick A. Foster admits the purchase as stated in the bill, denies notice, has paid no part of the purchase money, offers to relinquish, or do as the court may direct.

24] *L. & J. Clark plead purchase and full payment of the purchase money, and receiving a deed from the administrators without notice.

The minor defendants, by their guardian *ad litem*, answer, denying the facts.

The answer of Samuel and David Carpenter (filed November 9, 1829,) admits the death of Emanuel Carpenter, and the grant of administration to respondent, the execution of the notes set forth in the bill, and the indorsement as stated in the bill, and require proof of the diligence used to charge the indorsers. The

respondents knew, or rather it was known to said Samuel Carpenter, that complainants recovered two judgments in said common pleas, neither the notes nor judgments were ever presented to the respondents as administrators for settlement, and they have no knowledge of ever having seen the said notes. After the death of Emanuel Carpenter, jr., without any demand of respondents for payment and without presentation to them, writs of *scire facias* were sued out on said judgments and disposed of by nonsuit, and afterward nothing was said to these respondents by the complainants or by any one for them in relation thereto. The respondents know nothing of the execution or delivery of the mortgage or imperfect instrument set up in the bill; they can not say whether it was executed by Emanuel Carpenter, nor whether it was executed and delivered in the presence of Thomas Fricker, but require proof. In the year 1818, a *scire facias* was brought against the respondents on that mortgage, and in some way it was ascertained that a material alteration had been made in the mortgage, by adding thereto another subscribing witness, in consequence of which a plea of *non est factum* was filed with an affidavit; after which the complainants suffered a nonsuit. Respondents are of the opinion that they derived their knowledge of said alteration from their counsel, who examined the deed as recorded in the recorder's office, and they are satisfied that they were not informed of the alteration by the complainant or Marple, until after their plea was filed, when the counsel who brought the suit admitted the fact, and suffered a nonsuit; from which time, until the commencement of this suit, they had no intimation that said mortgage would be relied on in law or equity for any purpose. The respondents, after the letters of administration were granted to them, found that the personal *property was insufficient [25 to pay the debts, and that judgments to an immense amount had been recovered against the said E. Carpenter in his lifetime, and that it was necessary to sell his real estate.

At the March term, 1820, an order of court was made for sale of the land on which E. Carpenter had resided; and on July 15, 1820, a number of lots were sold to Wm. W. Irvin. Respondents have read and adopted so much of said Irvin's answer as relates to the sale to him, payments, order of confirmation, execution of the deed, etc. They also adopt that part of said Irvin's answer in relation to the legal proceedings on said mortgage, and the writs

of *scire facias* to revive said judgments of the complainants. (Here follows a list of the sales of the real estate made on July 15, 1820, on October 17, 1823, on September 29, 1827, and October, 1828.) Two of the purchasers have received deeds, viz: W. W. Irvin and Joshua Clark. Defendants having doubts as to whether judgment creditors of an insolvent estate had any priority, made a case, and submitted the same to the Supreme Court, which decided that the judgment creditors had a priority, to which decision the defendants conformed. Defendants being desirous to close their accounts, as far as practicable, filed their papers in the common pleas for settlement, and at the March term, 1828, the court approved of the payments made, as exhibited in schedule K, which payments were made from the sale of said real estate. The amount of the sales, including Leathers' land, was then about twelve thousand eight hundred and fifteen dollars and twenty cents. Since that time the defendants have paid the Bank of Chillicothe, in full of all their judgments, the further sum of one thousand two hundred and eleven dollars and thirty-six cents, out of the real estate proceeds; the said settlement with court was made in good faith, and in obedience to a citation, and is made a part of the answer, etc.

The answer of William W. Irvin, filed November 13, 1829, admits the execution of the notes set forth in the bill, and the indorsement of the notes, but requires proof of due diligence to fix the indorsers. In 1818 respondent was engaged as counsel to defend a suit brought by David J. Marple against the administrators of E. Carpenter, jr., on a mortgage purporting to have been duly executed by said E. Carpenter to said Marple. Respondent presumes he was then advised and believes such to have been the fact, from the plea filed in the cause that after the execution of the
26] deed, a material alteration *had been made by adding a subscribing witness, there having been but one at the time of its delivery, if delivered, and at the time it was recorded, as will appear by the record, reference to which is hereby had. The plea of *non est factum*, supported by the affidavit of said Samuel Carpenter, jr., was filed, and at the —— term, A. D. 18—, the cause came on for a hearing, and the plaintiff suffered a nonsuit. Respondent is not conscious of ever having seen the original mortgage, but recollects that it was admitted by Wyllys Silliman, Esq., who was on that occasion the attorney for the plaintiff, that the alteration was made, but whether the deed was subscribed by the second wit-

ness before or after the death of E. Carpenter, jr., defendant does not know, but requires proof of the time. From that time to the filing of this bill, this defendant believed that was an end to all claims under the said deed, and never heard directly or indirectly that complainants, or any one of them, intended to claim the land in said deed specified. Order of the court authorizing the administrators to sell lands for payment of debts. Sale had July 15, 1820, under which defendant became the purchaser of eight lots. At the March term, 1829, sale to defendant confirmed by the court, and administrators ordered to make a deed to defendant, which deed was according made and delivered, May 12, 1829.

(The answer then gives a statement of the payments made by the defendant on his purchase, and his allowance for fees as counsel for the administrator, leaving a balance due from him of about one hundred dollars.) The sales of real estate were nearly, if not quite, all made before the pretended claim on the mortgage was again brought forward; the purchase money was also, to a large amount, distributed among the judgment creditors and others, and the payments sanctioned by the court at the March term, 1828.

Defendant took possession of land so purchased by him, and has made lasting and valuable improvements. He purchased in good faith, at a high price, and under the belief that his title was undisputed. There are a number of judgments in favor of the Bank of Chillicothe older than the complainant's judgments; also one in favor of Gilman and Ammidon; one in favor of John Baldwin; one in favor of Bosler and Huber, and defendant refers to the judgments for greater certainty. Defendant is not aware that any consideration *was given to E. Carpenter, jr., as an induce- [27
ment to sign said mortgage, other than the three months time stated in the defeasance, if *that* forms a consideration, and requires proof of the consideration, and also of the delivery of said deed. Defendant knew of the complainant's two judgments, but at what time he acquired this knowledge he can not recollect. The settlement with the court was made openly and in good faith, etc.

Amended answer of Samuel and David Carpenter (filed November 13, 1834). These defendants, in regard to the pretended mortgage, set up in the bill and amended bill, answer as they have already done—(then follows a statement of the sale of the Leathers

land, and the application of the proceeds, which is not abstracted, as it is understood the counsel for complainant asks no relief touching that). In respect of the alleged devastavit of the estate of said E. Carpenter, jr., by defendants, they deny the charge, and exhibit certain schedules (A, B, C, D, E, F, G, H, I, J, and K), showing their proceedings to which reference is made. Since the settlement (of 1828), defendants have received about one thousand three hundred and sixty-six dollars and thirty-four cents, from the sources pointed out in schedule "L," and have paid it out as shown in same paper.

Prior to the death of said Emanuel Carpenter, jr., the defendant, Samuel Carpenter jr., was associated in partnership with him in the business of merchandise. Defendant withdrew from the concern prior to the death of E. C., jr., under the agreement that he was to be saved harmless from the debts, and be reimbursed for his capital advanced, to wit: four or five hundred dollars. Since E. C., jr.'s, death, defendant, S. Carpenter, jr., as surviving partner, has been engaged in settling up the debts of the concern, and finds it insolvent—has paid debts out of his private means, and has not received his capital advanced, except about one hundred dollars.

Amended answer of W. W. Irvin (filed November 20, 1835). The defendant is now of opinion that he erred in his former answer, in stating that the cause was managed at the trial by Wyllys Silliman, Esq. It is now his opinion that Charles R. Sherman acted as attorney for the bank on that occasion.

Replication to the several answers and plea.

The other defendants as in default.

28] The complainants have taken the depositions of Wyllys *Silliman and Thomas Fricker, the subscribing witnesses to the mortgage.

Wyllys Silliman swears, that the mortgage was, as he fully believes, executed in the presence of Thomas Fricker, Carpenter, and himself, and that Fricker signed the same as a witness at the time of its execution, and that he does not believe that the mortgage was in the possession of Fricker, or that he had an opportunity of signing his name as a witness, from the date of the execution of the mortgage, until a dispute arose respecting the time at which Fricker signed the deed as a witness, and that from the best of his recollection, the mortgage was in his (deponent's) possession until about the time it was delivered to the recorder for record.

Thomas Fricker swears, that he attested the deed as a subscribing witness on August 14, 1816; he presumes that this was the time from the date of the deed, and that it was acknowledged before him as a justice of the peace.

On cross-examination he states, that he resided in the town of Lancaster from the year 1805, until the time of taking the deposition; that he was a justice of the peace from 1811 to 1817, and that he did a great deal of business as such; that from the time of the execution of the deed, it was a considerable time before the subject was brought to his recollection or notice, perhaps seven or nine years, when he was inquired of respecting the acknowledgment of the deed, by a person who, he was informed, was a lawyer from Zanesville, and at that time he only recollected that he took the acknowledgment; that he could not, at that time, have testified that he witnessed the deed, if he had not seen his name as a subscribing witness, and that he has no other ground for stating that he was a witness, than from the fact that his name is there as a witness; that when he took the acknowledgment of a deed, and at the same time subscribed his name as a witness, he sometimes used one kind of ink in signing his name to the acknowledgment, and a different kind in signing his name as a witness, but that it was owing to the kind and quality of the ink; that when it was too thick, he would add other ink which might make a difference in color; that he never did place his name, as a witness to a deed or other instrument, at any other time than at the time of executing the instrument, or in the presence of the party making it. That when called upon to sign a paper, he does not charge his memory, or read the contents, when he *supposes the parties are com- [29 petent to understand it themselves, but otherwise when called upon specially to make the contents known to one of them, and further, that in the deed above referred to, he did not think it necessary even to inquire into the contents.

DEFENDANTS' TESTIMONY

Deposition of Wyllis Silliman (taken by defendant October 22, 1835). I was the attorney for Bank of Muskingum in the years 1818-'19-'20, and several other years; I, or Mr. Sherman under my directions, commenced a suit in Fairfield common pleas on the mortgage; I have no recollection whether or not I was informed of the plea and affidavit filed before nonsuit, but suppose Judge

Sheaman would have communicated so important a fact, nor can I recollect that Judge Sherman advised me of the result of the trial. I suppose I knew of the death of E. Carpenter, and that his estate was in a course of settlement, and I can not now assign any reason why the claim of the Bank of Muskingum against him was not prosecuted; except that about the time of his death, this claim, among others, was assigned by the Bank of Muskingum, to the agent of the United States, to secure a debt, and the future management was in the hands of J. C. Wright, district attorney. During the administration of J. Q. Adams, I made an arrangement with Mr. Rush, then secretary of the treasury, for the relinquishment of the lien of the United States on the claim so assigned, by the payment of the debt due the United States by the Bank of Muskingum, and one-half the interest which had accrued from the period of the assignment. I am of the opinion that there was a regular assignment to the United States, and that no steps were taken by the United States upon the claims assigned whilst their lien continued. I do not recollect that any claims of the Bank of Muskingum were ever presented to the administrators of Carpenter by me or any other person. In the negotation with Mr. Rush, for the reassignment of the claims, I am under the impression that I urged a release of all the interest, because of the neglect of the government in not prosecuting them. Mr. Buckingham (the president of the bank) gave it as his opinion all the interest ought to be remitted by the United States for that reason. My impression still is, that Fricker attested the mortgage at the time of its execution, and that I retained it until 30] it was handed by me to *the recorder; I have no recollection who received it from the recorder's office, nor whether Judge Sherman had the mortgage during the suit; but presume, from the nature of the case, that he must have had it. Mr. Buckingham could have had access to the paper at any time whilst it was in my possession, but whether he had or not I can not recollect; I have a very imperfect recollection of the custody of the mortgage from 1819, until I gave it to Mr. Stillwell, within four years ago, but I am rather impressed with the belief that it was with me during that period. I was a director and stockholder in the Muskingum Bank some time after 1820; the Carpenter debt was considered doubtful, and the reason I think was information that the deed was recorded with only one witness, in consequence of

which other creditors had taken the land; the decision upon the *scire facias* was probably known.

P. Beecher. The attestation of Thomas Fricker to the document marked (A) was not on the deed at the time of the controversy in court growing out of the same, and Mr. Silliman gave up the cause on that account; there was but one witness to the deed, and it was rejected by the court on that account. I do not remember whether Judge Sherman or Mr. Silliman conducted the cause, but am of the impression it was Mr. Silliman; is distinct in his recollection that there was but one witness, and that the objection was made and sustained.

H. H. Hunter. I am acquainted with Thomas Fricker's handwriting. I have examined the signature of Thomas Fricker to the attestation and acknowledgment of the complainant's mortgage, and his genuine signature to old papers. Independently of the comparison of those signatures, I could not pronounce either of the signatures in the mortgage a forgery. In making comparisons, the signature to the acknowledgment corresponds more exactly to other genuine signatures than does the signature in the attestation. In all the genuine signatures which I have examined, there is a stop between the *c* and *k*, the name from the capital *F* being uniformly written to that point continuously, without raising the pen. This stop is to be seen in the name at the acknowledgment, but is wanting in the name to the attestation; if either of these signatures is not genuine, it is that of the attestation. I incline to think, without collateral information, *and relying on my own judgment and knowledge, I should [31 not have been able to pronounce the attestation signature a forgery, but have taken it to be genuine.

M. Z. Kreider. Has paid considerable attention to handwriting of individuals, has examined the signature at the attestation and at the acknowledgment of the deed, and is of opinion that they are not the same handwriting, nor made with the same ink nor same pen, and that the attestation signature is not the same handwriting, ink or pen, with the body of the instrument. I have examined a large number of genuine signatures of Fricker, and would say, from the result of this examination, that the attestation signature is not the same handwriting, but the acknowledgment is the same with the genuine signatures.

Cross-examined. The distinguishing difference in the attesta-

tion and acknowledgment signatures is the non-joining of the *c* and *k*. I wrote the name, Thomas Fricker, on the paper on which my own name is also written; this *fac simile* more nearly resembles the signatures of Fricker than the attestation signature resembles them. I made the *fac simile* the 17th inst. I never attempted a *fac simile* of Fricker's signature before; it was the third effort. I did not take the pains with it I might have done; consequently, did not make it so perfect as I might.

Jacob Beck. I am acquainted with the handwriting of Fricker, has seen him write, and has seen a great deal of his writing, and does think (N. B. In the original deposition it is written, by mistake, "does *not* think") that the attestation to the deed is not the handwriting of said Fricker.

Cross-examined. If the attestation signature has been exhibited to me alone, without comparison, I could not have formed an opinion. Agrees with Kreider's deposition.

Thomas Ewing, having appeared on the part of the defendants; and having been duly sworn, according to law, deposeth and saith:

That he recollects to have been present when a suit, commenced by *scire facias*, in the court of common pleas for Fairfield county, between David J. Marple, plaintiff, and the administrators of Emanuel Carpenter, deceased, defendants, was discussed in court. It is my impression that the cause was submitted to court upon an issue testing the validity of a mortgage deed. I distinctly 32] recollect to have heard it said in *court at the time, that the deed had but one witness. I think I saw the deed at the time, but of this I am not certain, and I am pretty distinct in my impression the cause was conducted by Mr. Sherman, as the friend of Mr. Silliman, who was counsel for the plaintiff, but who was absent at the time. The name of Marple I understood to have been used for the Muskingum Bank, which was the real plaintiff.

My attention was again called to this subject, a year or eighteen months after; at which time I was engaged, by the Bank of Chillicothe, to collect a very large amount of the estate of Carpenter, consisting in judgments rendered against Emanuel Carpenter in his lifetime, and which would have the precedence over the claim of the Bank of Muskingum, if this mortgage were invalid; but part of them would have been cut out by it if it were valid.

During the progress of these causes, I know well that I went upon the position that the mortgage deed was defective in that

particular; and guarded as well and as speedily as possible against an attempt (which I thought might be made) to set it up in equity—and further saith not. T. EWING.

Also came Elnathan Scofield, who, being duly sworn, deposeth and saith:

That he was in the court-house in Lancaster, some years ago, when the cause of the Bank of Muskingum against the administrators of Emanuel Carpenter, was called up for trial; and recollects that the mortgage deed, which was produced (being the same referred to in the deposition of T. Ewing), was admitted to have been defective, inasmuch as it had the signature of but one attesting witness. Deponent does not remember to have examined the deed; but it is distinct in his recollection that the cause was called up, and that the subject was talked over by the counsel at the table; and it was agreed, on both sides, that the mortgage being defective in respect to the attestation of witnesses, that the suit could not be sustained. Deponent further states, that, in consequence of this defect, the cause went out of court, and further, that the cause produced a considerable degree of excitement at the time, both in and out of court, there being a number of persons interested in it, as the mortgage covered the lands of Emanuel Carpenter, jr. And further saith not.

E. SCOFIELD.

*Also came Hugh Boyle, and, being sworn according to [33 law, deposeth and saith:

That he was recorder of deeds of the county of Fairfield in the year 1817; and on the 5th day of February of the same year received a mortgage deed to record, of which the document marked (D) and herewith attached is a copy; and that said deed was recorded in his (deponent's) own handwriting of the record of the above date; and when so recorded, there was but one subscribing witness thereto. Deponent further states that, recollecting this defect in the deed, he paid no attention to the proceedings in court, so as to be able to state anything definite of what there occurred; further saith not. HUGH BOYLE.

Samuel Carpenter. I became convinced (and how I do not recollect) after the suit on the mortgage was commenced, and while it was pending, that the mortgage was defective, as it was attested but by one subscribing witness. I heard nothing further

of this mortgage from the dismissal of that suit until within a week of the commencement of this suit; and no demand was at any time made on account of said mortgage, or for any claim growing out of the same, unless the prosecution of the *scire facias* was a demand.

William Crook. Was deputy sheriff, and present at the trial of the *scire facias;* heard that the mortgage had but one witness, and I understood that when it was found out that there was but one subscribing witness, Thomas Fricker then added his name as a witness. There was considerable excitement about it at the time in and out of the court-house.

The said Dan Convers deposeth and saith: That in the year 1812, and until 1824, he, the said Daniel, was a stockholder in the Bank of Muskingum, and a director in the same institution in the year 1824 and the preceding year; and knows that a suit was brought by the said bank against said Emanuel Carpenter, jr., on a mortgage supposed to have been executed to Marple for the benefit of the bank, and was advised as a stockholder that the bank failed in obtaining judgment on the said mortgage; can't distinctly identify the time when he heard of the result of the suit, but thinks it was before he sold out his stock in said bank. Ebenezer Buckingham, jr., was a stockholder and president of said bank from the year 1817 until his death in 1832; has had conversation with said Buckingham on the subject of the 34] above-mentioned *suit on the mortgage, and thinks he was first informed of the failure of said suit by said Buckingham, and his impression is that said Buckingham told him that the bank lost the suit because there was but one subscribing witness to the said mortgage. The reason and the cause of failure in the suit was inquired into, and was ascribed to the want of one subscribing witness to the mortgage, and the magnitude of the sum involved made those interested attentive to the matter. Never heard until recently that there was a second witness to the deed; never inquired particularly. In a conversation between said Buckingham and this deponent, it was concluded that if there was loss, Mr. Silliman, who was the attorney for the bank in obtaining the said mortgage, ought to bear it, and that they both were complaining of Silliman's neglect. Deponent further states that all the claims held by the bank against said Carpenter were assigned by said bank to the United States as security; so far as this deponent has

any knowledge of the matter, he believes such assignment to have been made. In 1824, there was an order of the directors that any stockholder might transfer his stock in payment of debts at seventy-five per cent., reserving the residue to pay the debts of the bank; that this deponent, on reflecting on the situation of the concerns of the bank, came to the conclusion to sell out his stock, and accordingly sold and transferred his stock to the bank; thought at that time that the Carpenter claims were doubtful; that among the claims transferred to the United States there was fifteen thousand dollars of debts considered doubtful, among which were the said Carpenter claims.

Cross-examination by counsel of complainant:

It was my opinion, and the opinion of the other directors, so far as I know, that the bank considered themselves liable to the United States for any loss that might arise in the debts assigned by the bank to the United States. It was said that the failure in the suit was owing to the want of one witness to the mortgage. Never heard anything said about the record of the mortgage; never saw the original mortgage until this day. From the books of the bank, it appears that the assignment from the bank to the United States was made January 19, 1821, and the amount assigned forty-two thousand seven hundred and eighty-three dollars and twenty-nine cents. This deponent believes that the assignment was made as the same appears from the bank to have been made.

*Stillwell, for complainants: [35

The first and most important questions in this case are: Did Thomas Fricker subscribe his name as a witness to the mortgage; and if so, when? The defendants deny that he ever subscribed it, and assert that his name appended to it is a forgery. To sustain this position, they rely on the depositions of H. H. Hunter, M. Z. Kreider, and Jacob Beck. The first witness does not pronounce any opinion, but states that, had he formed an opinion from his general knowledge of Fricker's writing, he should have thought it genuine; the second knows nothing of the writing, except by comparison, and by comparing this signature with the acknowledged signature of Fricker, he believes that this is not genuine; the last has seen Fricker write, but is unable to form an opinion from this knowledge; he agrees with Kreider as to the compari-

son with other writings. Without examining how far this testimony is competent, I proceed to inquire into its effect. The signatures of Fricker, from which the witnesses form their opinions, are before the court, and we ask the court to examine them. The only difference pretended by the witnesses between the genuine signatures of Fricker and the alleged forgery is, that in the former the *c* and *k* are not joined, and in the latter that they are; otherwise this forgery is admitted to be successful, defying even the microscopic examination of one of the counsel who argued the case on the circuit. There is indeed a remarkable uniformity in this particular. There is also another characteristic in his signatures as uniform as this, that is, that in writing the name of Thomas he leaves the same space between the *o* and *m* as he does between the *c* and *k* in his last name. The defendants might as well contend that the signature was a forgery where the *o* and *m* are connected as where the *c* and *k* are; yet in two of the signatures admitted to be genuine, and in that to his deposition, the *o* and *m* are joined, and the *c* and *k* are joined in one of the admitted genuine signatures (marked A B, No. 1). Indeed, the connection between the *c* and *k* is a strong evidence of the genuineness of the signature. In all imitations of handwriting, the veriest bungler in the art of counterfeiting will observe and strictly copy the marked peculiarities. It is only the general appearance, and so to call it, the countenance of the writing that betrays the imposture. Yet, in this case the general resemblance to the genuine signatures of
36] Fricker is *fully preserved, while it differs from the particular characteristics; and what would be more singular, were it a forgrey, it more nearly resembles some of the other signatures of Fricker than the one attached to the same paper, which was before the forger at the time he committed the forgery. On the hypothesis of forgery, how do gentlemen account for the space between *o* and *m* and the connection between *c* and *k*? If a forgery, the space was left between the two first; because it was so in the original, the attention of the forger was directed to this peculiarity; and for the same reason would have been directed to the last. Although his intention had not been called to this particular, Kreider, in his imitation, leaves the vacancy between the *o* and *m*.

The defendants next claim that, admitting it to be genuine, the signature of Fricker was not made at the time the deed was executed by Carpenter. To support this, they assert that the name

of Fricker, as a witness, was not written with the same pen or the same ink as his name to the acknowledgment. An inspection of the paper will show that little confidence can be placed on this ground. His name, in either case, is manifestly not written with the same ink used by Carpenter and Silliman. The color of the ink in both his names is the same; one a shade darker than the other, but both having the same peculiar tinge. There is certainly not enough difference to rebut the presumption that they were written with the same ink and pen. And even if they were, what would follow, but that the pen not suiting him, or some other circumstance intervening, after he had written the name in one place, took another pen, and either used the same ink or from another stand; or, as he states, finding that the ink was too pale or too thick, he refilled the stand. Either of these would have accounted for a much greater difference of color in the ink. Repeated experience must convince any one that no weight can be attached to such a circumstance.

The testimony of P. Beecher, T. Ewing, E. Scofield, and W. Crook, is taken to prove that there was but one subscribing witness to the mortgage at the time of the *nonsuit* on the *scire facias*. The witnesses do swear that the deed was present, and that there was but one subscribing witness. It happens, unfortunately for this testimony, that W. W. Irvin, Samuel and David Carpenter, have all sworn directly to the contrary. I deny that the defendants can introduce *testimony to disprove a fact stated in the answer, [37 or to make a case different from that set up in the answer. But admitting that they might do so, more reliance is certainly to be placed on the recollection of parties who are interested than in that of persons who have no interest in observing or remembering. The affidavit written by Irvin, and sworn to by Samuel Carpenter, and attached to the plea to the *scire facias*, fully shows that both Irvin and Samuel Carpenter knew that the names of two subscribing witnesses were at that time attached to the mortgage. It is entirely clear, then, that the gentlemen who testify that they saw the original mortgage at the time of the *nonsuit* of the *scire facias* are mistaken; not in the fact that they saw a paper to which the name of but one subscribing witness was attached; not in the fact that there was a conversation respecting it, but in the fact that this paper was the original mortgage. The case was not managed by the counsel who brought it, or who was employed by the plaintiffs;

but as appears by the testimony of Mr. Ewing, "by Mr. Sherman as the friend of Mr. Silliman." He was not furnished with the original deed; the record is produced showing it to have but one witness, and he submits. Prudence would have required, knowing as he did the grossly negligent habits of the officer who made the record, that the record should not have been relied upon; and no doubt he would have so acted had he been the counsel employed. The fact of the *nonsuit* is communicated to the Bank of Muskingum, with the reason of the failure, the mortgage remaining in the possession of M. Silliman; the bank takes it for granted, without examination, that there is but one witness; its affairs are in a distracted condition, without a regular board of directors; shortly afterward the whole matter passes from their hands, by assignment, to the United States. With a careful or attentive counsel managing the business, or had the bank been located at the place of trial, or the mortgage the property of an individual, this probably would not have happened. How far Mr. Silliman sustains the character of a careful lawyer, it is unnecessary to state. At the earliest period after the complainants regain the control of the matter they proceed, and it is the impression of Mr. Silliman that after the mortgage was recorded, he retained possession of it until he delivered it to the counsel who filed this bill. That counsel 38] also fell into the common error, and framed the *original bill accordingly; whether from an inspection of the affidavit filed by Carpenter to the *scire facias*, or by information derived from one of the defendants, can not appear, as that counsel can not be a witness. The bill now asserts that the deed was witnessed by Fricker at the time of the execution. The only fact or circumstance going to disprove this position is contained in the deposition of Mr. Boyle, who testifies that the mortgage had but one witness at the time it was recorded. One can readily conceive of a careful, much more a very careless recorder, omitting the name of one witness to a deed, and after the lapse of years, substituting with the strictest integrity a recollection of the record for that of the original. To rebut the testimony of Mr. Boyle, the complainants have the testimony of Mr. Silliman and Mr. Fricker. The first swears that he fully believes that the deed was witnessed by Mr. Fricker at the time of the execution. Mr. Fricker swears that he does not recollect the fact of witnessing the deed, but that the signature is his, and that he has no doubt that he witnessed it at the

time it was executed, and that he did not witness it at any other time; that he never witnessed a deed except when he saw it signed, or in the presence of the party who signed it. Now, Mr. Fricker ought to be a judge of the genuineness of his own signature; at least as good as a man who never saw him write, and whose attention is first called to his signature, by a suggestion that it is counterfeit, and who goes into the examination with a disposition to find it so, and that he can detect it as readily as others. There is nothing singular in the fact that Fricker does not recollect the act of witnessing the deed; it was no doubt an every-day occurrence, with nothing in the case to impress it upon his memory. But had he witnessed it at any other time, the circumstance would have been so much out of the ordinary course, that he must have recollected it, particularly if it had been when Carpenter was not present. He says that he never did witness this or any other deed except at the time it was executed, or in the presence of the person who signed it. As this was a general rule, a deviation would have made an impression on his memory. The act of doing it would not have been of course; to induce him to sign his name, explanations would be made, arguments used; he to sustain his general rule, and the person applying to induce him to change that rule, all calculated to *make an indelible im- [39 pression. The case then stands on the question, whose testimony shall outweigh, Boyle or Fricker's? I mean not in point of integrity, for both are undoubted. But who, under the circumstances, would most probably be correct? In addition to this, there is the testimony of Mr. Silliman. The circumstances attending the transaction, and all the probabilities, are in favor of witnessing at the time. The parties went there for the purpose of having the deed properly executed. Silliman and Fricker both knew that two witnesses were necessary. It is also quite as probable that Boyle would have omitted the name of Fricker in the record as that Fricker would have omitted to witness the deed. The conclusion to my mind is irresistible that Fricker witnessed the deed at the time of the execution, or that his signature is a forgery.

Let us examine how far a person could expect to derive any benefit from the forgery. If a forgery, it must have been committed after the deed was recorded, and before the time of filing the plea to the *scire facias* (September 18). I trust that I have

succeeded in showing by the answers of Irvin and the Carpenters, and the affidavit to the pleas, that there were two witnesses at the time the affidavit was filed. If a forgery, the evidence against it would have been, first, the record, and as the matter was recent, the danger of the recollection of Boyle, Fricker, and Silliman, together with the loss of all hope of settling up the mortgage in equity. If a forgery, by whom was it made? Mr. Silliman's impression is, that it always was in his possession.

The deposition of Samuel Carpenter, one of the defendants, is taken on the part of Irvin. It can not be received as testimony. There is no order for taking it. He does not state a single fact. At some time, when he does not state, how he does not remember, he became convinced that Fricker did not witness the deed at the time it was executed.

Place the case, however, on the ground assumed by the defendants, that Fricker did attest the mortgage at a time subsequent to the execution. We contend that if he were present and saw it executed, or if it had been acknowledged before him by the grantor, he might rightfully do so; that this attestation would make the mortgage legal between the parties themselves, by relation to the time the mortgage was executed, as to other persons 40] after they had notice of the *additional attestation. Whether Fricker did or did not witness the mortgage at the time of its execution, it was undoubtedly the intention of the parties that he should do so. There is nothing in the statute which requires that the act of subscribing by the witnesses shall be contemporaneous with the acknowledgment or in the presence of the grantor. Undoubtedly the party claiming the benefit of the conveyance must show that the subscribing witness was present and saw the deed executed, or heard the grantor acknowledge it. And that not a casual presence or acknowledgment, but under such circumstances as would clearly show that he intended it should be witnessed by the person who subsequently does witness it. This is abundantly shown in this case. It is also admitted in the answers of Irvin and the Carpenters, that Fricker did subsequently witness it. With these limitations, I can conceive no objection to the subsequent attestation. In an action of ejectment in the Supreme Court in the county of Guernsey, some years since, a deed was offered in evidence, to the acknowledgment of which the justice

had not affixed his seal; the justice was in court, there affixed his seal, and the deed was then received in evidence.

So far from admitting the effect produced by Fricker's subsequent attesting the mortgage as claimed by the complainants, the defendants contend that such witnessing would be fraudulent and entirely destroy the mortgage as an equitable one. An alteration made in any written instrument, without the consent of the other party, avoids the contract; but we contend that this is not such an alteration; that it was an act the complainants had a right to do, or to have done. It is not an alteration of anything signed by the party, but merely doing by another person what the grantor intended that person should do; an addition, but what he intended the other person should make, and the time of making which was to the grantor no way material. I would here remark that if the attestation of Fricker were at a time subsequent to the execution by Carpenter, it must have been in the presence of Carpenter, otherwise Fricker would not have attested the deed, or if he had in the absence of Carpenter, for the reasons before stated, he would have remembered the fact.

This mortgage was recorded with the name of but one subscribing witness. We admit that this record is not notice. *The [41 administrators had actual notice by the service of the *scire facias*, and Irvin at the time of filing the plea (September, 1818). We admit not notice that Fricker witnessed the deed at the time of its execution, but notice that there then were two subscribing witnesses, and notice to all defendants that the mortgage was subscribed by two witnesses, at the time of its execution, by the filing of the amended bill.

What are the consequences flowing from these facts? Admitting that the mortgage was witnessed by Fricker at the time it was executed, we presume that our right to the unpaid purchase money on the sales by the administrators will not be questioned. We claim more:

1. That, admitting that the mortgage was attested by Fricker, not at the time of the execution, but subsequently, as Irvin and the Carpenters had notice before any of the sales were made, the mortgage is valid, subject only to the judgments in favor of the Bank of Chillicothe, rendered prior to the date of the mortgage.

2. That, admitting the subsequent attestation of Fricker to add

nothing to the validity of the mortgage, we contend that it is an equitable lien, which a court of equity will protect and enforce.

As between Carpenter in his lifetime, and the complainants, on this question there would be no doubt, we contend that his death makes no difference; that his administrators in this respect, representing his creditors, stand in the same situation that he did in his lifetime. On the circuit, this was admitted as to general creditors. It is nothing more than applying the familiar rule that, equity considers that as done which is agreed to be done. The application in this particular case is sustained by authority—2 Powell on Mortgages, 435, 436. "If money be lent, and there is a contract or agreement for a mortgage, if the party dies without making the mortgage, and the estate descends to the heir as assets for specialty debts, that contract is superior to the rights of those specialty creditors. And a court of equity, after the death of the party, and when all their engagements are to be arranged, will give a specific lien." Defective mortgage sustained against the lien of a judgment cited. 1 P. Wms. 279.

An imperfect agreement, intended as a security, will be sup-
42] ported as a mortgage, even against judgment creditors. *3 Des. 74; 2 Des. 564. See also 3 Vesey, 576, in which the whole doctrine is discussed; and 3 Ohio, 527, where the court sets up a defective conveyance against a subsequent judgment, A defective mortgage is considered an agreement to execute a mortgage. A judgment has not a specific lien until levy. It is merely an incumbrance at large, and does not become specific in its character until levy. This was admitted on the circuit, but it was claimed that the judgment had been levied on the land contained in the mortgage, and therefore was entitled to priority. I do not admit the principle, but it is unnecessary to discuss it, as no execution has ever been levied on the land in controversy. The defendants are mistaken in their answers, and counsel in their assertions. The certificate of the clerk shows that all the levies were made on five hundred and fifty-three acres in section 13 the land in controversy is in section 12. On their own admissions, then, and which was the only recognition of the acknowledged law, this mortgage, even as an equitable one, has a lien superior to all the subsequent judgments. The complainants contend that the mortgage has not lost its priority, but not being recorded with the two subscribing witnesses, within six months, or before the judgments were rendered.

Whatever may be the law at this time, by the statute then in force, a mortgage did not lose its priority over a subsequent judgment, provided the mortgage were recorded at any time before a sale under the judgment. 4 Johns. 216. No sale was ever made under any of these judgments.

The defendants claim to be discharged from their liability, because the demands were not presented to them. I do not know what they call a presentation, for at the same time they set up this defense, they admit notice of the notes, mortgage, and judgments before the land was sold; and that a *scire facias* on the mortgage and on the judgments was served on them; a more formal notice, demand, and presentation I can not conceive.

They also allege that the present bill is too late, and that they supposed the plaintiffs had abandoned all claims on the mortgage, and had consented to throw away the ten or fifteen thousand dollars. I admit no length of time less than that presented by the statute of limitations sufficient to bar a claim on the mortgage; that would not be less than fifteen years, and the bill was filed within that period. No part of the *conduct of the plaintiffs [43 was calculated to induce a belief of an intention to abandon the claim. Suffering a nonsuit is saying in the plainest language, we are satisfied that we can not succeed in this form of action, or at this time; but we will not have the door closed; we intend to make another trial. The creditor of an estate, after giving notice of his demand to the administrator, is not barred by mere delay less than the statute of limitations. He may safely wait, and if the administrators pay out the funds to his prejudice, or if they sell lands on which he has a lien, it is at their and the purchaser's peril. Neither can they justly complain that they or their counsel mistook the law of the case, and that they will now be prejudiced by a correct application of the law.

The law prior to the act of February 12, 1824, did not authorize administrators to sell lands, incumbered by mortgage, by an order of court. They might doubtless have done so by application to a court of chancery, making the mortgagee a party. The sale by the administrators, prior to that time, does not affect the mortgage. The act of 1824 authorizes a sale of land incumbered by a mortgage only in a case where there is a prior judgment. 2 Chase's Stat. 1308. The sales of the lands, prior to 1824, were more than sufficient to pay off the prior judgments. The complainants

therefore claim that all the sales beyond sufficient to pay these judgments are as to them fraudulent and void.

The defendants next seek to protect themselves under the settlement made with the court in 1828. This was made long after the time of settlement had expired, without notice to complainants, and yet it is claimed that they are bound by it. The accounts are filed and settled at the same term. It would be a very easy matter for an administrator to protect himself if a course of this kind were sufficient for the purpose. But the court in that settlement only find the facts that the administrators had received and paid out certain sums of money. They do not pretend to decide as to the very facts now in dispute, whether complainants had a prior right to the money. That question was not before them. The court decide in the case of Piatt *v.* St. Clair's Heirs, 6 Ohio, 227, that an order of this kind is fraudulent and void. There was fraud in this case, whether morally or not, does 44] enter *into the question; they paid money to others to which we were entitled, and with notice of our lien.

With respect to this settlement, it may be further remarked that because they have made payments to a greater amount than they have received from the land, it is claimed that they shall have the benefit of the unpaid purchase money to reimburse them for such advance payments. We contend that such advances can not prejudice our claim to the unpaid purchase money.

The defendants also seek to protect themselves under the alleged liens of the judgments. I have endeavored to show that such liens are inferior to the mortgage. Admitting the contrary, these liens can apply only to the sales of July, 1820; before the next sales all the judgments had become dormant, except those in favor of the Bank of Chillicothe, and were never revived. As they were levied in the lifetime of Carpenter, the land, as the law then stood, might have been sold under these judgments, and so the judgment creditors acted, for they all issued writs of *vend. ex.* after his death, returnable to the June term, 1818. Whatever then might have been their lien against the mortgage, it ceased when they became dormant.

Suppose the mortgage entirely void, the application of the proceeds of the sales to the payment of judgments dormant at the time of sale was inequitable; the fund belonged to the general creditors; the proprietors of these dormant judgments stood only

in that position. They could not complain, for their own neglect placed them in that position. Should the loss now fall on the administrators who have misapplied the funds by payments to them it is their own mistake, not that of complainants.

The defendants urge that it is a badge of fraud that complainants did not proceed diligently on the mortgage. If there were anything in the argument, it would apply more strongly to these dormant judgments, because the owners or their counsel were on the spot and had the control of the judgments, which the complainants had not.

The defendants pretend that by the nonsuit on the *scire facias*, they were induced to believe that complainants had abandoned all claim under it, and it is suggested that the nonsuit was suffered, and the mortgage suppressed, lest the forgery of the name of the last subscribing witness should be *detected. Who kept [45 it back? Judge Sherman managed the case at the time; Mr. Silliman was the counsel in the case. The complainants also brought a *scire facias* on their judgment and suffered a nonsuit, and took no further steps on the judgment. Precisely the same course as on the mortgage. The defendants might as well pretend that they believed the judgment fraudulent, and that complainants abandoned all claim under them, as to make that pretense respecting the mortgage.

I would further remark, that if Fricker witnessed the deed after it was executed, it must have been by the request of those interested. It would have been considered as the neglect of Mr. Silliman which required it to be done, and as he was the person present when the deed was acknowledged, he would have been selected as the most suitable person to obtain the attestation of Fricker. Mr. Silliman was also the counsel of the bank, and had the defect existed, would have been consulted as to the effect, and had the bank intended to supply the defect, would have advised the mode. Had any of these things happened, it is not possible that he could have forgotten them. The testimony of Mr. Convers also shows that there was no subsequent attestation. Mr. Buckingham said that the debt was lost because there was but one subscribing witness. Now this was after the nonsuit, before which the answer states the bank had obtained the attestation. Had such been the fact, would Mr. Buckingham have stopped here? Would he not have stated the whole matter, that it was true that there was originally but one witness, but that that defect had been sup-

plied? There is no doubt but that in fact the names of two witnesses were to the deed in 1818; yet that fact is not known to Mr. Convers, one of the directors of the bank. May we not infer that the other directors were equally ignorant, and acted under the impression derived from the result of the trial without seeing the deed?

The counsel for defendants, who abstracted the amended answer of the administrators, misunderstood the counsel for complainants, in supposing that they abandoned all claim to relief in respect to the money arising from the sale of Leathers' land; they abandoned only the claim set up in the bill to be substituted to the lien of the Bank of Chillicothe on this fund.

46] The facts, as to this fund, as disclosed by the amended *answer are, that Leathers' notes, on which Carpenter was indorser, had been discounted by the Bank of Chillicothe. By an arrangement of the parties, the notes of Carpenter were substituted for those of Leathers; Leathers afterward confessed a judgment in favor of Carpenter, and gave him a mortgage on land; this land was sold by Leathers, who paid the judgment and mortgage out of the money received for the land, to the administrators. The giving of this judgment and mortgage formed no part of the arrangement between the Bank of Chillicothe, Carpenter, and Leathers.

The first question is: Had the Bank of Chillicothe a lien on this money? If they had, it is a lien in equity only; one which a court of law could not notice.

It does not appear by the amended answer, or any part of the case, which of the judgments of the Bank of Chillicothe against Carpenter was rendered on his notes for Leathers' debt; whether those prior or subsequent to complainant's mortgage. If prior to that mortgage, the money (on the supposition of lien) should have been applied to those judgments alone.

Before the defendants can claim that this fund shall be applied to the judgments subsequent to complainant's mortgage, they must show that these judgments were rendered on the notes given for Leathers' debt; for it is only on this ground that the exclusive lien of these judgments can be supported. As they claim the existence of the exclusive lien of these judgments, they must show the facts necessary to support it.

If the Leathers debt, assumed by Carpenter, was not kept separate from his own, but all blended together in the several notes

which he gave to the Bank of Chillicothe, then this fund should have been ratably apportioned among all the judgments in favor of the Bank of Chillicothe. In making the payments the administrators so treated it. They did not separate it from the original fund arising from the sales of land; they did not apply it to the payment of any particular judgments, or claim that it should be applied to the judgments subsequent, rather than those prior to complainant's mortgage.

They now claim differently, that it shall all be applied to the subsequent judgments, leaving the whole of the prior judgment a charge on the land.

Complainants contend that the Bank of Chillicothe had no *lien on this fund, that it should have been applied to the [47 payment of the general creditors, or that if a lien existed, all the judgments, as well prior as subsequent, had equal claims.

Complainants admit that the bill must be dismissed as to L. & J. Clark, who purchased and paid the purchase money without notice of the mortgage.

They ask a decree against Noble and Clark for the balance of their purchase money remaining unpaid, with interest; and a decree against the other purchasers for the amount of the purchase money remaining unpaid.

They ask a decree that the judgments in favor of the Bank of Chillicothe prior to their mortgage receive a ratable proportion of the Leathers fund.

They admit that the prior judgments had a lien in preference to the mortgage, and are willing that the proceeds of the first sales should be applied to that purpose, so far as Irvin is interested. Foster and Creed, the other purchasers, have paid no part of their purchase money.

They claim that the administrators are trustees for them for the rest of the purchase money received, and ask a decree against them.

They ask, if it should be found that the Bank of Chillicothe had not a lien on the Leathers fund, that it be apportioned to the general creditors.

They ask that the personal assets should be marshaled; that the case be referred to a master for that purpose, with authority to collect and to pay out the funds according to the principle of the decree, and that the administrator deliver to him all the securities

they have taken, and pay to him all funds in their hands, and for such other relief as they are entitled to.

W. W. IRVIN, for respondents:

In the investigation of this case, the following points, among others, are presented for the consideration of the court:

1. Is the deed on which the complainants rest their claim the act and deed of Emanuel Carpenter, jr., in the form in which it is now presented to this court?

2. If executed with but one witness, was the consideration such as to justify the interference of this court?

3. If, in a case between the parties to the deed, the mistake 48] *would be rectified, can it be done against creditors having judgment liens upon the same property, acquired subsequent to but without notice of the claim of the plaintiffs?

4. If originally, the complainants were entitled to relief, is not that right lost by the lapse of time and their own negligence?

5. Has this court, as a court of chancery, other than in cases of contested wills, jurisdiction in all matters of a probate and testamentary character?

6. Are the purchasers protected by these sales, and did the court act correctly in the distribution of the money arising from the sale of the lands of Fricker, Leathers, and the lands of the intestate?

1. Is the deed on which the complainants rest their claim the act and deed of Emanuel Carpenter, jr., in the form in which it is now presented to the court?

The complainants, in their original bill, asked the assistance of the court to give effect to a mortgage deed imperfectly executed, inasmuch as there was but one subscribing witness to it at the time of its execution. Subsequently, by leave of the court, they amended their bill, by stating that there were two witnesses to the deed at the time of its execution, and that it was not an imperfect instrument, as they had supposed.

Two of the defendants, in their answers (Mr. Carpenter and myself), deny that the deed had two witnesses to it when executed, and give it as their belief that it is an altered instrument, and in that opinion they believe they are sustained by the evidence.

The deed bears date August 14, 1816, and was recorded with

but one subscribing witness to it, on the 5th of February next thereafter.

On February 5, 1818, Emanuel Carpenter, jr., died, deeply indebted and insolvent. In the month of February of that year, Samuel Carpenter and David Carpenter were appointed his administrators.

In the month of June next thereafter, a *scire facias* was sued out of the clerk's office of the court of common pleas, against the administrators of Emanuel Carpenter, by Wyllis Silliman, Esq., or the late Judge Sherman, as counsel for the complainants, upon the mortgage deed. This suit was brought in the name of David J. Marple, the grantee named in the deed, for the use of the bank.

*At the September term of the court, 1818, the defendants [49 filed their plea of *non est factum* to the writ of *scire facias*, to which plea was annexed the affidavit of one of them, giving as a reason why it was not the deed of Emanuel Carpenter that it had at the time of its execution but one subscribing witness.

One year thereafter, at the September term, 1819, the cause came on for trial, and by agreement the issue was submitted to the court, and upon an investigation of the case the plaintiffs suffered a nonsuit.

On that trial, it was admitted by the counsel for the bank that there was but one subscribing witness to the deed at the time of its execution. This is proved by the depositions of Thomas Ewing, Judge Scofield, and William Cook, then a deputy sheriff.

Mr. Cook says that the understanding was, that Fricker had put his name to the deed as a witness after its execution and delivery.

Mr. Silliman, on his cross-examination, was unable to state anything certain in relation to the attestation of the deed by Fricker, and was equally uncertain what became of it thereafter. He, however, thinks it probable that it was in the possession of Judge Sherman at the time of the trial.

Mr. Boyle was then recorder of deeds for this county, and recorded this deed himself. He says his attention was drawn to the fact that there was but one witness to it when he recorded it, and positively swears that there was but the one. It was so recorded. Mr. Ewing thinks he saw the deed at the trial.

General Beecher swears he then saw it, and that the name of

Fricker was not on it as an attesting witness. Mr. Beecher and Mr. Ewing were then counsel for the Bank of Chillicothe, whose claims against the estate of Carpenter were large; and from the interest they felt for their clients, they watched with attention the trial then progressing, inasmuch as the establishment of the mortgage would have measurably taken from their clients the fund from which their judgments were to be satisfied.

Colonel Daniel Convers, of Zanesville, says that for many years he was a stockholder of the Muskingum Bank, and for one or two years one of its creditors; that when they heard of the loss of the suit on the mortgage it created surprise, and an inquiry was made 50] into the cause of the failure, when it *was ascertained that the suit was lost because there was but one subscribing witness to the deed. Upon his cross-examination, he was asked if the suit was not lost in consequence of the deed being *improperly recorded*? He answered no, and again stated that it was for the want of a second witness to the deed. He also says that he conversed with Mr. Buckingham, the president of the bank, on this subject, and that he complained of the counsel of the bank who took the mortgage, and says he ought to sustain the loss. Under the impression that this debt was measurably lost, Mr. Convers says he sold his stock at a reduced price.

To this may be added the evidence of the complainants themselves. As late as 1827, and for some time thereafter, they and their counsel rested under the belief that the deed was defectively executed, as will appear by the statements in the bill of complaint.

To this volume of evidence what have we opposed? The evidence of Thomas Fricker! Is not the evidence of Mr. Boyle and General Beecher as affirmative as that of Fricker? They saw the deed, and swear from actual inspection that there was but one witness. Fricker swears at that time there were two. Which of these witnesses is to be believed? Will the court reject the evidence of such men as Mr. Boyle and General Beecher, sustained as they are by all the other proofs in the cause, and say that Thomas Fricker alone is entitled to belief?

With this statement of facts, from witnesses of high respectability, a doubt can not exist in relation to the attestation of the deed. Nor can it be believed, in a controversy with the administrators of an insolvent estate for a sum exceeding ten thousand

dollars, that the vigilant and able counsel for the plaintiffs would have admitted that there was but the one subscribing witness to the deed if such were not the fact, especially as Fricker, who had improperly attested the deed, was a resident of the town, and lived so near the court-house that his attendance might at any time have been had within a few minutes. On that trial the plaintiffs were not taken by surprise. They were advised by the pleadings that the execution of the deed was contested. They had the deed in their possession and the witnesses at their command.

The witnesses say that much excitement was caused both in and out of the court by the trial. For a period of twelve *or [51 thirteen years the accuracy of the admissions of the counsel was never questioned by the bank or any one else. I will then ask if it is not now too late to produce a conviction upon the minds of the court that the counsel engaged in the cause, the court who tried it, the defendants, the attorneys, and officers of the court were all mistaken, and that the deed then really had two witnesses to it instead of one?

This court, as a court of equity, is now called upon after a lapse of nineteen years from the execution of the deed, to carry it into effect, as a true and genuine instrument, notwithstanding the whole of the property embraced within it, has been sold to purchasers without notice, and for the full value of the land, and that, too, by order of a court of competent jurisdiction. Neither Mr. Carpenter nor myself had ever seen the deed before our answers were filed. We supposed and believed the alteration was made before the trial, but in what way we gained our knowledge we were unable to relate. The abiding impression upon our minds has been that the name of Fricker was improperly inscribed upon the deed. In other words, we believed that the name of the second witness had been procured to impose upon the administrators, and to secure a legal advantage to the plaintiffs, which, otherwise, they could not possess.

2. If executed with but one witness, was the consideration such as to justify the interference of this court?

The first inquiry is: What inducement was there for Carpenter to execute the deed? His notes were then due, and the holders had a legal remedy to enforce payment. The bank did not bind itself to forbear suing on the notes, and the day of payment was

not deferred. It is true, they agreed not to proceed on the *mortgage* for a given time; but the mortgage was only collateral security, and did not prevent the holders of the notes from proceeding at any time to recover the amount due.

The agreement on the part of Carpenter was purely voluntary, and unsustained by a single benefit to himself. Courts of equity will not decree the specific performance of a voluntary agreement. 1 Madd. Ch. 48, 112–115.

It is, however, said, if a *voluntary deed is sufficient to pass the estate out of the conveyor*, it will be specifically enforced, provided it 52] is supported by a valuable, or at least a meritorious *consideration, *such as the payment of debts*, or making a provision for a wife or child. 1 Madd. Ch. 414. In 1 Comyn on Contracts, 8, it is said the civilians held that, in all contracts, either expressed or implied, there must be something given in exchange—something that is mutual or reciprocal.

In the case of Parkhurst *v.* Vancourtland, 1 Johns. Ch. 282, the chancellor says it seems to be very generally and very properly laid down in the books, that a court of equity never will decree performance when the remedy is not mutual, or one party only is bound by the agreement.

In the case of Howell *v.* George, 1 Madd. 12, the chancellor says the want of mutuality in a contract is sufficient ground for refusing a specific performance.

At law a deed imports a consideration; but when real estate is concerned, I apprehend a very different rule prevails in equity. In courts of equity the technicalities of the law are dispensed with. The chancellor, without being fettered by scroll, seals, or wafers, takes a comprehensive view of the subject, and acts upon the merits of the cause. However he may feel himself bound not to set aside the agreements of parties, he never will grant relief, unless the demand of the complainant is sanctioned by the purest principles of equity. Indeed, this principle has been carried so far that the specific performance of an agreement, founded on a good consideration, has been refused when it would operate oppressively upon one of the parties. Sugden's Law of Vendors, 155.

It is said at law that the forbearance to sue, or the giving time to pay a debt, is a sufficient consideration to sustain an action; but in the case now before the court, only the one party is bound, and there is no mutuality of benefit, no forbearance to sue, no giving

of time to pay the debts, for there was nothing to prevent the prosecution of suits the next moment on the notes.

In most of the cases to be found on this subject, an actual consideration existed. Such was the fact in the case of Barr *v.* Hatch, 3 Ohio, 528, and in the case to be found in Johnson's Chancery Reports, where the deed made by the sheriff did not include all the land sold by him to the purchaser.

Perhaps in the annals of our jurisprudence a few cases *may [53 be found that would seem to warrant a conclusion different from the one for which I contend. If such should be the case, they are at war with one of the best principles to be found in our system, that there must be a mutuality or reciprocity of benefit, a *quid pro quo*, to render obligatory the engagements between man and man. And why should this principle be invaded in this case? The equal distribution of assets among creditors is a favorite doctrine in equity, and is founded in the purest principles of justice. Such impressions were deeply implanted in the mind of the chancellor, who decided the case of Burr *v.* Burr, 3 Ves. 575, and nothing but the force of precedent induced him to depart from the dictates of his better judgment.

That case belongs to a different class from the one now before the court, and from the manifest injustice done to other creditors, ought not to be extended beyond the class to which it immediately belongs.

3. If, in a case between the parties to the deed, the mistake would be rectified, can it be done against creditors having judgment liens upon the same property, which were acquired subsequent to, but without notice of the claim of the plaintiffs?

The claims of the Bank of Chillicothe, the Granville Bank, and the other judgment creditors of Mr. Carpenter, were as purely equitable as the claims of the Bank of Muskingum. They succeeded in the race, and secured for themselves the first legal lien, and is it just, now, to take from them that lien, and give it to another creditor, who had failed in his attempt to monopolize everything for his own benefit?

Between two equities, it is said that the senior shall prevail, but if the legal estate be added to the junior, without notice of the senior, then the junior acquires the priority. Lessee of Hiester *v.* Fortner, 2 Binney, 47. The judge who decided that case says: "Having the legal estate in him a court of chancery, between two

equities, would not interpose to his disadvantage, but where the loss had happened, there would it be permitted to continue. It falls within the common rule, that where of two persons equally innocent, or equally blamable, one must suffer, the loss shall be left where it has fallen."

If there be any analogy between the case cited and the one now 54] before the court, then the other creditors have, *without notice of the defective deed, secured a legal lien on the estate of Carpenter. This lien is equivalent to a mortgage duly executed, and has a decided preference over the equitable claim of the plaintiffs. To illustrate my idea more fully, suppose the creditors had taken mortgages instead of judgments, could this court, upon any known principle of equity, set aside the mortgages thus obtained, unless notice could be brought home to the mortgagees of the existence of the prior equitable incumbrance. There is no proof of notice in this case, *actual* or constructive, unless the registry of the mortgage should be construed into constructive notice. In the case referred to in 2 Binney, 47, it is decided that the record of a deed of that character, is not notice to a subsequent purchaser.

In the case of Frost *v.* Bushman, 1 Johns. Ch. 300, the chancellor says, that "the question does not necessarily arise in this case, how far the unauthorized registry of a mortgage, as one made, for instance, without any previous legal proof or acknowledgment, would charge the purchaser with notice of the mortgage. The better opinion in the books seems to be that it would not be notice, and that equity will not interfere in favor of an incumbrancer where he has not seen that his mortgage was duly recorded." The chancellor, in support of this opinion, cites Sugden's Law of Vend. 527; 1 Shoale & Lefroy, 167; 2 Binney, 40.

Section 2 of the act for the recording of deeds, mortgages, etc., passed February 9, 1810, see 8 Ohio L. 97, makes it the duty of the recorder to record all deeds and mortgages, and conveyances of lands and tenements, lying within his county, and also all other instruments and writings which by law are required to be recorded.

The act providing for the execution and acknowledgment of deeds, passed February 14, 1815, see 8 Ohio L. 398, points out what instruments shall be recorded, among which the deed of the complainants is not included.

I take it then as the recording of this deed, with but one wit

ness, was not required by law, that the record of it is not notice for any purpose whatever.

If my views of the superiority of the judgment liens over the equitable incumbrance should be correct, then it becomes wholly unnecessary to inquire whether the administrators of Emanuel Carpenter, or the purchasers of the property under *the [55 orders of the court, had, or had not, notice of the defective deed of the complainants. The property was bound without their agency. The liens of the judgment creditors, by the sale, were transmitted to the purchasers, and certainly it will not be contended that the complainants have the right to demand and take from them a greater interest in the property than they could have done from the judgment creditors. It is a settled rule in chancery that a purchaser with notice to himself, from one who purchased without notice of the fraud, may protect himself under the first purchaser. 1 Johns. Ch. 213.

To avoid the effect of the liens which the judgment creditors had acquired, the counsel for the complainants attempted to draw a distinction between what he terms a *lien at large*, and a *specific lien*. I am really at a loss for a reason to sustain the distinction. The statute made each judgment a lien on the lands of the defendant from the first day of the term in which it was rendered. The only difference between a judgment and a mortgage is, that, in one case, the lien is conventional; and in the other, the act and operation of law. In both cases the property is bound to satisfy a particular demand. If the levy renders the lien specific, then it matters not, in this case, whether the distinction exists or not, as executions on all the judgments taken out in the lifetime of the intestate, were levied on the land in dispute. Up to that time the judgment creditors were wholly unaffected by notice of the defective deed, nor is there any evidence of their being advised of it at any time.

4. If originally the complainants were entitled to relief, is not that right lost by the lapse of time and their own negligence?

By the provisions of the act passed January 25, 1816 (see Vol. xiv, part 1, 150) defining the duties of executors and administrators, it is made the duty of the administrators to give notice to creditors by advertisement, to produce their accounts for settlement, legally proven; and, if the personal property should prove insufficient for the payment of the debts due from the intestate, it

then becomes a further duty to apply to the court for an order to sell the real estate.

The complainants know of the death of Mr. Carpenter, and that administration was granted on his estate. They also knew that 56] he died deeply involved, if not insolvent, and that the *administrators were proceeding to settle up the estate. The facts, here referred to, are proven by the evidence of Mr. Silliman, the proceedings on the mortgage, and the admissions in the bill of complaint.

Very shortly after the nonsuit of the plaintiff in the *scire facias* on the mortgage, application was made to the court, by petition, to sell the real estate of Emanuel Carpenter, to pay his debts; and the first sale of the mortgaged premises was made to myself in July, 1829. Several years elapsed before a sale of the land could be effected. Under the act last referred to, it was doubtful with the administrators whether, as the estate was insolvent, it was their duty to pay all the debts in just proportion; or whether they were to pay first the judgment creditors, according to their respective liens, and then the other creditors, who had no specific liens. For this purpose an amicable suit was brought, and the pleadings so shaped as to obtain the opinion of the Supreme Court on that point. The Supreme Court decided, that the judgment creditors had a preference, and that their judgments ought to be paid according to the priority of their respective liens.

In compliance with this opinion, the administrators applied the purchase money, arising from the sales, to the payment of the respective judgments. This money has not only been applied in discharge of the respective judgments, but, upon a citation served upon the administrators, they made out a full statement of their proceedings, which, at the April term of the court of common pleas, 1828, was submitted to and examined by the court, and ratified and confirmed in all respects, as will appear by the orders of the court.

Mr. Silliman swears that he was the attorney for the bank, and has no knowledge that the claims of the bank were ever presented to the administrators for settlement. The defendant, Samuel Carpenter, in his answer, swears they were not. This is rendered probable, also, by the assignment of these claims, shortly after the nonsuit, and many others, to the United States; and by the complaints of the directory of the bank, that the claims were reduced

in value by the negligence *of the government;* as a compensation for which the United States relinquished one-half of the interest on a sum exceeding forty thousand dollars for the whole time they held these claims. If a strict computation was made after deducting judgments older than the mortgage deed from the amount for which the *mortgaged premises sold, it is highly probable [57 that the bank made, by the alleged negligence of the United States, more than they could have realized by the sale of the land.

Upon the trial of the *scire facias* the complainants acknowledged that there was but one subscribing witness to the deed, and when defeated by the opinion of the court a nonsuit was suffered. From that day until May, 1829, a period of nearly ten years, nothing more was heard of this debt. It never was presented to the administrators for payment, and it never was intimated to them that it would be, in any form whatever. The notice required by law to be given to the creditors makes them parties to the proceedings of the administrator in the adjustment of the estate. They have a right to except to his accounts when filed for settlement; they have a right to ask for his removal, to cite him to settle, and to contest before the court the correctness of his proceedings in every form. In this case the complainants made no objections to the orders of the court for the sale of the property, they took no step to prevent the sales or the distribution of the purchase money, and they made no objections to the orders of the court confirming the sales.

It appears to me that the complainants, if they ever had a claim, are too late in now presenting it to the court. They have been guilty of the grossest negligence, the effect of which, if their deed is now set up, must be seriously injurious to all concerned.

The negligence of the United States, while they held this claim, was urged by the officers and agents of the bank, and, from a sense of justice, they were compensated for that negligence; and now they are asking that they may be recompensed, by taking from those who bought in good faith and for a valuable consideration. Had the complainants pressed their claims in good time all this trouble would have been saved. The administrators and the purchasers had no wish to take from them a single cent; it was to them wholly immaterial *to whom* the purchase money was paid. Acting, as they did, in good faith, the penalty now sought

to be inflicted on them will be indeed severe for not adjusting a claim which was abandoned by the complainants themselves.

5. Has this court, as a court of chancery, jurisdiction other than in the case of contested wills, of matters of a probate and testamentary character?

58] *The second clause of the third article of the constitution provides that the Supreme Court shall have original and appellate jurisdiction, both in common law and chancery, in *such cases as shall be directed by law.*

The fifth clause of the same article declares that the court of common pleas in each county shall have jurisdiction of all probate and testamentary matters—granting administration, the appointment of guardians, and such other causes as shall be prescribed by law.

The act of the legislature directing the mode of proceeding in chancery, which was in force when this suit was brought (see vol. xxii. 75), gave to the court of common pleas chancery jurisdiction in all cases properly cognizable by a court of chancery, in which *plain, adequate,* and *complete remedy* could not be had at law.

The same act gave to the Supreme Court concurrent jurisdiction in all cases cognizable by a court of equity, when the title of land is in question, or the sum or matter in dispute exceeds one thousand dollars, and appellate jurisdiction in all cases regularly brought before them from the chancery decisions of the courts of common pleas.

In the act defining the duties of executors and administrators, the duties of the court of common pleas are pointed out, and there is but a solitary case, the contest of wills, in which there is a gift of jurisdiction to a court of chancery.

The constitution and the laws have, by a complete gift of jurisdiction to the common pleas, settled the question as to the *adequacy* of that court to grant relief in all questions of a probate and testamentary nature, and nothing was left for the discretion of a court of chancery, in relation to the *adequacy* or *inadequacy* of the court to perform the duties assigned to it by law. The attempt to take from, to limit, or to control the court of common pleas in the exercise of a jurisdiction thus conferred, is an unwarrantable assumption of authority, and unsustained by the policy which has been prescribed by the supreme authority of the state.

The right of the court to entertain jurisdiction where there is a

trust in relation to lands, or where fraud has intervened, is not questioned, but we object to those parts of the bill in which complaints are made that the administrators have not done their duty, and by which they are called upon to adjust their accounts in this court, and to pay to the complainants *their proportion of the [59 estate. How is this to be effected? Will this court, upon the application of any discontented creditor, enter into an investigation of every item of an estate? or will they refer it to a master? It then becomes a question of policy whether a master in chancery is better qualified or more likely to do justice than the judges of the court of common pleas. This matter I take to be settled by the constitution and laws, and nothing is left for the undefined discretion of the chancellor.

Should the court decide that they have jurisdiction, I presume it will be admitted to be *concurrent* and not *supervisory*.

If concurrent, the pleadings and evidence show that there has been a disposition of the personal estate, and of the whole of the real estate of the decedent; that the money has been in part collected and paid out, and that the proceedings of the administrators have been submitted to, and sanctioned by the court of common pleas.

On April 4, 1828, the administrators, having the previous term, presented their accounts, made a settlement with the court. The exhibits marked A, B, C, D, E, F, G, H, I, J, and K, present an accurate history of that settlement.

Exhibit H contains a statement of the amount received from the personal property, and the manner in which it had been distributed.

Exhibit K contains a statement of the sales of the real estate made by the administrators, including the sum of about four thousand dollars, received for the sale of the lands of Frederick Leathers, amounting in all to the sum of..... $12,815 20

Out of this fund payments, on judgments binding the estate, and other claims having a preference, were made, amounting to the sum of..... 11,093 56

Leaving a balance of..... 1721 64

At that term, the following entry was made upon the journal of the court:

"The administrators of E. Carpenter, jr., deceased, having

previously filed their accounts for settlement, this day the court, having fully inspected the disbursement and payments made as per statement, marked H, for five hundred and ninety dollars and fifty-six and one-fourth cents, including allowance to the administrators, do approve the same, and order it to be recorded. The court having, also, examined statement K, and the payments and disbursements therein made, approve the same, and order that a 60] record be made *thereof—which payment and disbursements, including allowance to administrators, amount to eleven thousand and ninety-three dollars and fifty-six cents."

| | |
|---|---|
| After the settlement, and before the filing of the bill, other sales of real estate were made, amounting to the sum of | $1366 34 |
| Between these periods, the administrators paid out of the moneys received from land sales, on judgments and for expenses incurred, the sum of | 1493 59 |
| Leaving a balance in favor of the administrators of.... | $127 25 |

This sum of one hundred and twenty-seven dollars and twenty-five cents, when taken from the residue of exhibit K, will leave in the hands of the administrators, arising from the sale of real estate, including the whole of that embraced in the mortgage deed, the sum of fifteen hundred and eighty-four dollars and thirty-nine cents, from which is to be deducted the costs of administration on land sales, counsel fees, etc.

The complainants object to this settlement, because, as they say it was made at the same term in which the papers were filed for settlement. In this they are mistaken. But if they are not, this court as a court of equity, can not correct the errors of a court of law, Stiver *v.* Stiver, 3 Ohio, 19; nor can the decision of a court be collaterally impeached.

Unless there is proof of fraud in the settlement, as was the fact in the case of Piatt *v.* St. Clair's Administrators, I take it that this court can not, and ought not to interfere.

6. Are the purchasers protected by these sales, and did the court act correctly in the distribution of the money arising from the sale of the lands of Frederick Leathers, and the lands of the intestate?

On August 7, 1816, the Bank of Chillicothe recovered three judgments in the Supreme Court against Emanuel Carpenter,

amounting in all to the sum of forty-two hundred and twenty-one dollars and nine cents. At the death of Mr. Carpenter, there remained due on these judgments, exclusive of interest and costs, the sum of ninteen hundred and forty-four dollars and fifty-five cents. This sum, it is admitted, had the superior lien upon the mortgaged premises. To satisfy these, and other judgments to a large amount, a sale was made by order of the court on July 18, 1820, of a part of the mortgaged premises, which, by permission of the court, had been divided into lots. At that sale, Frederick A. Foster purchased lot No. 3, containing three and seventy-five one hundredth acres for one hundred and fifty-five dollars and sixty-two cents. John Creed purchased lot No. *7, containing five [61 acres for one hundred and thirty-five dollars; and lots, 1, 2, 3, 4, 5, 6, 8, containing in all seventy-five and thirty-eight one hundredth acres, were sold to myself, for two thousand and ninety-one dollars and forty-four cents. No other sales of this property were effected until October 17, 1823.

So far, then, as these purchasers are concerned, the authority of the administrators to sell, is unquestioned; and it is wholly immaterial whether they had or had not notice of the deed of the complainants.

On August 12 and 14, 1817, the following judgments were rendered in the Supreme Court, against Emanuel Carpenter:

| | |
|---|---|
| One in favor of the Bank of Chillicothe, for the sum of | $1,719 51 |
| One other in favor of the same | 1,743 86 |
| One in favor of Bostler & Co., for | 671 48 |
| One in favor of John Baldwin, for | 478 50 |
| One in favor of Gilman & Amidon, for | 878 39 |
| One in favor of the Granville Bank, for | 1,753 73 |
| On September 29, 1817, a judgment was rendered in favor of Edward & G. Twells, for | 1,228 96 |
| And on October 3, 1817, two other judgments were rendered in favor of the complainants, one for | 1,733 75 |
| The other for | 2,313 52 |

The last two judgments were rendered on notes, intended to be secured by the mortgage. Each of the above judgments, had priority of lien upon the real estate of the intestate to those of the complainants, except the one in favor of Godfrey & Edward Twells, and in that case the plaintiffs gained priority by their vigilance.

The September term of the court of common pleas, 1817, com-

menced on the 29th of that month, and ended on the 4th of October. October 15, 1817, an execution was sued out on the judgment in favor of E. & G. Twells, and placed in the hands of the sheriff on the 17th. On the 20th of October executions were sued out on the judgments of the complainants.

The act then in force, gave no preference to executions sued out within ten days after the term in which judgments were rendered; but after that time the execution first sued out was to be first satisfied. A question of precisely this character was decided by the Supreme Court in Fairfield county, in the case of the Bank of St. Clairsville v. The Sheriff of that County.

62] *Upon all the judgments to which I have referred, executions were sued out and levied on the tract of land mentioned in the mortgage deed, prior to the March term of the court of common pleas, 1818.

In paying out the money arising from the sale of lands, the administrators, in compliance with the decision of the Supreme Court, satisfied these judgments according to their respective liens, and were sustained in so doing by the court of common pleas at the settlement in 1829.

The money arising from the sale of the property of Frederick Leathers, was applied to the payment of the judgments rendered in favor of the Bank of Chillicothe, on August 14, 1817, and satisfaction was entered for the amount paid on the execution docket by the counsel for the bank. Of this act the plaintiffs complain, and say that the money ought to have been equally divided, as personal property, among all the creditors.

The complainants, in their bill, inquire of the administrators, how this claim against Leathers originated, which information is given by the answer of the administrators. The answer is responsive to the bill, and as the plaintiffs have adduced no evidence, is conclusive upon that point. The administrators, in their answer, state that Emanuel Carpenter gave his notes to the Bank of Chillicothe, in part for the debt of Frederick Leathers, upon which the judgments referred to were rendered. As a security to Mr. Carpenter for his liability, Leathers confessed a judgment, on which his property was sold.

This property was held in trust by Emanual Carpenter, and every principle of equity required the application of it in extinguishing the debt for which it was given in security. This

money, if not subject to distribution as personal property, the complainants contend ought to have been apportioned among all the judgments in favor of the Bank of Chillicothe.

The Bank of Chillicothe held two securities for their debt, both of which were necessary for its safety if the mortgage deed is sustained. If a party has two securities, and both ample, I admit that a court of equity will compel him to surrender one of them; but this is the first instance in which I have heard it contended, that a court of equity will require such a distribution of two securities as to render them *insufficient for the payment of [63 the debts for which they were given. This will be the case in this instance, if the complainants are sustained in the principle for which they contend. If one-third of the money arising from the sale of the property of Leathers should be applied to the payment of the first three judgments, it will lessen the extent of the lien on the mortgaged land; and if the mortgage is sustained, the residue of the money arising from the sale of the property of Leathers, will be insufficient to pay the last judgments. Such a distribution of two securities, it is believed, never will be required by a court of equity.

As the judgments were not revived against the administrators of the intestate, it is contended that they have become dormant, and that the liens are lost. This assumption is unsustained by the decision of the Supreme Court to which I have referred, and is wholly irreconcilable with the provisions of the act of February 11, 1824, defining the duties of executors and administrators. That act makes it the duty of the administrators to pay: 1. Funeral expenses and costs of administration: 2: Judgments rendered against the intestate *in his lifetime*, according to their respective *priorities*, so far as the same operated as a lien on *the estate of the testator in his lifetime*. Under the provisions of this act many of the sales were made. It is not however necessary to press this inquiry, as the executions were taken out in October, 1817, and levied before the death of the intestate. When execution is taken out in the lifetime of the judgment debtor, and levied either before or after his death, there is no principle better settled in our law, then that the plaintiff may proceed to sell the property taken in execution without reviving the judgment against the representatives of the deceased.

If an alteration was made in the deed, I presume it will not be

necessary for me to make a single suggestion in relation to the impropriety of its receiving the concurrence or sanction of a court of equity.

H. STANBERY, on the same side:

I do not propose to argue the question as to the attestation of the mortgage. That is so purely a question of fact, to be determined in part by inspection of handwriting, and has been so fully considered by my colleague, that further argument is unnecessary.

64] *If the court should be of opinion that the mortgage was duly executed, it is next to be inquired what relief the complainants may be entitled to, as it respects the purchasers of the mortgaged premises, the administrators, and the fund yet remaining for distribution.

1. As to the purchasers: It is admitted by the counsel for the complainants, that those who had not actual notice of the mortgage at the time of their purchase and payment of purchase money, are protected. Notice is not pretended as to any one of them except Irvin, and he is not affected by it.

*First.* Because the only knowledge he had of the mortgage before the filing of this bill, was connected with information of its being an altered instrument.

*Second.* Because at the time of his purchase there were judgments older than the mortgage, to be satisfied, and the duty of appropriating the money did not devolve upon him.

2. As to the administrators: It can not be denied that the order for the sale of this land conferred upon the administrators the power to sell; that is impliedly conceded in the admission that the purchasers at the sale took a good title. The administrators then, so far as the sale of the land and the receipt of the purchase money were concerned, acted in conformity with the law. Then comes the distribution of the money, and here the first question arises. The complainants contend that the administrators were bound, after satisfying the three judgments of the Bank of Chillicothe, to pay the amount due and secured by the mortgage, in preference to the subsequent judgments; and that their failure to do so has entitled the complainants to a decree against them for the entire fund so misapplied.

For a right understanding of this question, it is necessary to

have a view of the statutes upon the matter of distribution and the administration of assets in force whilst these proceedings were in progress.

The act of January 28, 1816, 2 Chase's Stat. 929, was the law in force at the decease of Carpenter and the sales of 1820 and 1823. Section 33 authorized the sale of the real estate for the payment of debts, and directed the administrators to pay out the proceeds to the several creditors, and report proceedings from term to term.

There is no distinction made by the terms of this section between debts which have a lien and those which have not; but by construction it has been settled, and without doubt, *correctly, [65 that priorities existing at the decease were to be regarded in the distribution.

Next in order is the act of February 11, 1824, 2 Chase's Stat. 1308. Section 18 directs the administrators to pay *judgments* according to their priorities, so far as the same operated as a *lien*, and no farther, from the fund arising from the lands bound by the judgments; the amount to be determined by the court, and to distribute the remainder among the general creditors; and it further provided that no execution should be issued on judgments rendered in the life of the intestate within the time allowed for the settlement of the estate; and that the purchaser should get a title unincumbered by the judgments.

By the amendatory act of February 7, 1825 (2 Chase's Stat. 1464), it is provided that in all cases where land bound by judgment and subsequent mortgage should be sold by the administrators under an order of court, the purchaser should take, discharged of the mortgage, judgments be first paid, and remainder applied to the mortgage as in sales on execution.

This act is the first in which any mention is made of a mortgage; and it contains a special direction of what shall be done with the money where land is so situated. It did not alter the law, or confer a power to sell in this condition of incumbrances which had not a previous existence; for the prior judgment being the first lien must have been satisfied out of the land, notwithstanding the subsequent mortgage on the same land.

The judgment creditor had the right to enforce a sale during the life of the intestate, and the sale would have carried the whole title, notwithstanding the mortgage. The death of the judgment debtor did not take away the liability of the fund, but it sus-

pended the right to have execution, and transferred the power to sell to the administrators, who, out of the proceeds, were directed to pay the judgment.

The next act is that of March 12, 1831 (3 Chase's Stat. 1781), now in force, and which repeals the foregoing. Section 29 provides that after the funeral expenses, etc., the administrator shall pay mortgages and judgments rendered in the life of the decedent, according to their priorities of lien, so far as the same operated as a lien in the intestate's life; the proceeds to be applied to the lands bound by the mortgages and judgments.

It is very clear, from the necessary meaning and construction 66] *of the act of 1816, and the express language of the subsequent acts, that, upon the sale of the real estate, the administrator was to pay debts according to their *liens* upon that fund, and according to the *priority* of lien. That being the law, let us begin our consideration of this case at the point of time when the money arising from this land is yet in the hands of the administrators for distribution; although, by the way, the complainants may have had rights then, which have since been lost. Here, then, were judgment creditors having liens upon this land, and a creditor who has a mortgage on record with but one subscribing witness. It is admitted by the opposite counsel that the record is not notice. Suppose the administrators to have actual notice of this record, are their consciences so affected by it, that they are bound to take care of the *equity* of the mortgage, and prefer *that* to the *legal lien* of the judgment creditors? An administrator does not stand in the light of a purchaser with notice of a prior equity. He is an agent of the law appointed to perform certain duties, and as it respects the distribution of the assets, he must prefer debts having liens to those which have not, and only pay respect to the liens as they existed at the death of his intestate. He has nothing to do with equitable rights. But we must go a step further to embrace all the facts; and, besides the notice to the administrators of the recorded mortgage, we must suppose them to have further notice that the original mortgage, with but one witness at the time of its execution, was subsequently made void by the unauthorized addition of another witness. That state of information would prevent them from even recognizing the original equity. And yet this is the true point of view in which this case is to be regarded before the distribution. If the complainants had rights, if they were

able to show a state of facts different from that of which the administrators were then advised, it was incumbent upon them, then, to assert those rights whilst the funds were yet in the hands of the administrators. So far from doing so, by a most unaccountable *laches*, they sleep on those rights from 1819 to 1829, a period of ten years; during which the land was sold, the money distributed, and the proceedings were approved by the court.

It is not pretended by the complainants' counsel that they can now open that distribution, and have a new appropriation of the money. They admit there is no recourse *against the pur- [67 chasers to make them pay a second time, nor against the judgment creditors to make them contribute to the mortgage out of the sums they have received. It is equally out of the question to ask relief against the administrators.

Thus far we have considered the rights of the complainants as they may have existed prior to the distribution and the settlement with the court. If it can be maintained that they might then have successfully asserted their priority, it is a very different question whether they can do so now—at least, so far as the money has been distributed. That distribution, by the admission of the complainants, has at least operated this change—that, as prior to it their right might have been asserted to the fund, so now, that it has been had, that right can only be urged against the administrators and the purchasers, with notice. The settlement must therefore stand; and no right ascertained by it is sought to be disturbed. So far, then, as the administrators are concerned, it becomes a question of personal liability, resulting from some misconduct in their representative capacity. What is this misconduct? Does it assume the character of a fraud? Certainly not. They acted in good faith. They stood in the relation of trustees holding a fund to be distributed to various creditors according to their legal liens. In the discharge of that duty they paid out the fund; and the judicial tribunal, appointed by the law to pass upon their proceedings, sanctioned this disbursement. It is urged, by the opposite counsel, that this settlement does not avail to protect the administrators, because they were guilty of a sort of *suppressio veri*, in not bringing before court, at the settlement, the equitable rights of the complainants. If they had brought to the notice of the court all their knowledge of this mortgage, in what respect would it have benefited the complainants? The

*truth*, according to their knowledge, was that this mortgage was a void instrument, by reason of the addition of a subscribing witness; and one of them had sworn to his belief of that fact in defense of the *scire facias*—and they had seen that litigation abandoned upon the admission of its truth by the counsel for the complainants.

If there were neglect in the timely presentation of these equitable rights the *laches* must rest exclusively on the complainants. Those rights had relation to a fund. That fund was distributed among creditors. There yet remained one more act before it 68] should be forever gone from their reach—*the sanction of the court to its distribution. That sanction was given in a judicial proceeding especially provided for the determination of conflicting rights. It is binding upon the complainants, so far as their right to the *fund* is concerned; and it is, under the circumstances of this case, a complete protection to the administrators. They are discharged of that part of their trust. The attempt to impeach the validity of that settlement upon the suggestion that it was had at the same term to which the accounts were filed, fails for the want of proof. So far as anything appears in the answers or testimony, as to the settlement, it seems to have been regular. There is no proof of the fact suggested; and, inasmuch as the order has been made by the proper tribunal, the presumption that it was legally made necessarily attaches.

Upon the whole, I am unable to see, in this branch of the case, any ground upon which a court of equity can be called upon to give relief against these administrators.

3. As to the undistributed money arising from the sale of the premises embraced in the mortgage. As against the general creditors without lien, the mortgage might be set up; but not as against the judgment creditors, who, in consequence of their levies in the life of Carpenter, had acquired a *special lien* on these premises. The authorities relied upon by the complainants are to that effect. Powell on Mortgages, 434, and cases there cited. In the case of Burr *v.* Burr, 3 Ves. jr., 573, the question was, whether an important bond should, after the death of the debtor, be set up in equity as a preferable lien to the simple contract creditor's? Upon opening the case, the lord chancellor inquired if there were any case in which a contract to give security to bind land would, as against creditors, be set up in the distribution of assets? After further argument and much hesitation, the chancellor does give

the relief against the simple contract creditors. It is evident from the whole case—indeed, it is admitted by the counsel (Solicitor General's *Arguendo*, 579)—that relief could not be had against creditors having specific liens.

LANE, J., pronounced the opinion of the court:

Before the plaintiff can set up a higher claim than a simple contract creditor he must establish the validity of his mortgage. It is asserted to be made void by a material alteration since the grantor's death, in adding the name of an attesting witness. If we look to the testimony of the defendant only we should *find it difficult to evade this conclusion. [69

Evidence is adduced tending to show that the name of the subscribing witness was not written by him. Witnesses the most unexceptionable, with means the most ample of learning the facts, including the spectator, the lawyer, and the judge, *almost* prove that the deed was exhibited at the trial, with this defect. The parties most interested in supporting the deed seem to have acted upon the opinion that the instrument was not valid. It is a striking example of the uncertainty of memory, to find this body of testimony completely disproved. The affidavit of one of the defendants to the truth of the plea to the *scire facias*, drawn up by another defendant, shows that at that time the deed had two witnesses, for the ground of resistance to it is, that the name of the second witness had been added to it, since the record. There is no sufficient proof of forgery, especially against the witness' own oath. The grantor intended when he made it, to make a good mortgage; a fraud is not to be presumed, Since, then, it is shown to have existed at the time of the trial, with the names of two witnesses, it is more probable, either that it always had two, one of which was omitted by the recorder, or if one was added subsequently to the registration, that it was added while the grantor was living, and with his consent. If either of these suppositions is true, the deed, although it conveys no legal estate, from the defective registration, is a good equitable mortgage, binding the mortgagor, his administrators and his heirs; affecting their rights from the time of its execution, as much as if it passed an estate at law.

There are judgments rendered in Fairfield county, both before and after the date of the mortgage, which are liens upon the land of the decedent. The three in favor of the Bank of Chillicothe,

having been rendered earlier than the mortgage, are admitted to be preferred. In regard to the others, the question is presented, whether an equitable mortgage, or a judgment at law, has the preferable lien.

Whenever rights are acquired, depending on, or in reference to specific property, they are regarded as possessing a superior equity to a general lien upon all the estate of a debtor, as the lien by judgment. The latter do not constitute a property *per se*, or a right in the land itself; it only confers the right *to acquire* such a property by levy. A mortgage is sometimes called a lien for the debt, but it is something more; it is a transfer of the land itself; the mort-
70] gagee is purchaser. *2 Cranch, 355; 3 Ib. 73; he takes the interest of the debtor subsisting at that time, and no posterior rights can be preferred to his. Such is the plaintiff's position; he has a specific interest in the lands, and is entitled to a preference over creditors by subsequent judgments. 2 Peere Williams, 279; 3 Vez. 581; 3 Dess. 568; 3 Ohio, 539; 5 Ib. 181; 1 Pow. Mort. 279; 2 Ib. 519; 2 Pow. Cont. 60; 4 Kent's Com. 154; 1 Ohio, 258; 10 Mod. 468; 1 Pet. U. S. 388; 4 Johns. 216.

When a trust to sell and raise money is created by the parties, by a deed, through which the purchaser traces his title, and in which the object of the trust is defined, it seems a rule in equity, that the purchaser should look to the application of the money; but where the law creates a trust, or confers authority to execute a trust, it imposes upon the purchaser no obligation to apply the money, further than to pay it to the trustee. This rule furnishes a principle in the present case; we find the administrators, the trustees created by law, for the purpose, and invested with authoriy to sell the assets, as a trust fund, and to distribute the avails according to the respective rights of creditors, and giving bonds to secure to all interested the faithful execution of these duties. It is a well settled principle of policy and law, to apply such rules to these sales as tend to confirm and render certain the titles they pass. 3 Ohio, 561. As it is made their duty to sell the land for the purpose of paying the debts, purchasers may safely buy, in the forms of law, and on payment hold it exempt from the lien, leaving the holder of the lien to look to the trustee and his security, for the faithful application of the money. Those defendants, therefore, who have purchased from the administrators, hold the land free from these incumbrances; the suit may be dismissed as

to such as have paid the purchase money; those who have not, are retained as parties, to secure the appropriation of the money due.

It is urged that the administrators were justified in distributing the assets of the estate among the other creditors, without regard to this claim of the plaintiffs, because no demand for the payment of it was made. But the administrators had notice of its existence, by the *scire facias;* notice, it is true, of a defective legal conveyance, but indisputable notice of the existence of the debt, and if we hold them to a knowledge of the law, notice of a good incumbrance in equity. They were not justified, with this knowledge, in distributing the estate *without providing for these claims. [71 If their extent or validity were doubtful, it would have been an obvious dictate of prudence to institute proceedings in chancery against all parties, by which all rights and interests would have been defined and settled; for the settlement of an estate in a court of probate is an *ex parte* proceeding, *prima facie* evidence only of correctness, and binding no rights, except where made in conformity to law.

A part of the assets received from the administrators have been derived from the sale of the Leathers' land. Leathers, with Emanuel Carpenter his security, was indebted to the Bank of Chillicothe; by an arrangement between them, the debt was assumed by Carpenter, and is embraced in the judgments which the Bank of Chillicothe obtained against him. To indemnify Carpenter, Leathers confessed a judgment binding his lands, the avails of which were applied, before the institution of this suit, upon a judgment of the Chillicothe Bank, rendered subsequently to the plaintiff's mortgage. The plaintiff asks to appropriate this sum upon the elder judgments of the Bank of Chillicothe, which subsisted at the time of his mortgage. The justice of this claim is not acknowledged; although a creditor with one fund can compel the creditor with two to exhaust the one he can not reach, before recurring to the other, it is too late to interfere with the application of money already made in good faith, by the creditor or the debtor.

We are, therefore, led by these principles to the conclusion that the mortgage deed is evidence of a debt against the decedent, which the service of the *scire facias* made known to the administrators; that it bound the land, from its date, as to all subsequently accruing rights (there being no purchasers for a valuable consid-

menced on the 29th of that month, and ended on the 4th of October. October 15, 1817, an execution was sued out on the judgment in favor of E. & G. Twells, and placed in the hands of the sheriff on the 17th. On the 20th of October executions were sued out on the judgments of the complainants.

The act then in force, gave no preference to executions sued out within ten days after the term in which judgments were rendered; but after that time the execution first sued out was to be first satisfied. A question of precisely this character was decided by the Supreme Court in Fairfield county, in the case of the Bank of St. Clairsville v. The Sheriff of that County.

62] *Upon all the judgments to which I have referred, executions were sued out and levied on the tract of land mentioned in the mortgage deed, prior to the March term of the court of common pleas, 1818.

In paying out the money arising from the sale of lands, the administrators, in compliance with the decision of the Supreme Court, satisfied these judgments according to their respective liens, and were sustained in so doing by the court of common pleas at the settlement in 1829.

The money arising from the sale of the property of Frederick Leathers, was applied to the payment of the judgments rendered in favor of the Bank of Chillicothe, on August 14, 1817, and satisfaction was entered for the amount paid on the execution docket by the counsel for the bank. Of this act the plaintiffs complain, and say that the money ought to have been equally divided, as personal property, among all the creditors.

The complainants, in their bill, inquire of the administrators, how this claim against Leathers originated, which information is given by the answer of the administrators. The answer is responsive to the bill, and as the plaintiffs have adduced no evidence, is conclusive upon that point. The administrators, in their answer, state that Emanuel Carpenter gave his notes to the Bank of Chillicothe, in part for the debt of Frederick Leathers, upon which the judgments referred to were rendered. As a security to Mr. Carpenter for his liability, Leathers confessed a judgment, on which his property was sold.

This property was held in trust by Emanual Carpenter, and every principle of equity required the application of it in extinguishing the debt for which it was given in security. This

money, if not subject to distribution as personal property, the complainants contend ought to have been apportioned among all the judgments in favor of the Bank of Chillicothe.

The Bank of Chillicothe held two securities for their debt, both of which were necessary for its safety if the mortgage deed is sustained. If a party has two securities, and both ample, I admit that a court of equity will compel him to surrender one of them; but this is the first instance in which I have heard it contended, that a court of equity will require such a distribution of two securities as to render them *insufficient for the payment of [63 the debts for which they were given. This will be the case in this instance, if the complainants are sustained in the principle for which they contend. If one-third of the money arising from the sale of the property of Leathers should be applied to the payment of the first three judgments, it will lessen the extent of the lien on the mortgaged land; and if the mortgage is sustained, the residue of the money arising from the sale of the property of Leathers, will be insufficient to pay the last judgments. Such a distribution of two securities, it is believed, never will be required by a court of equity.

As the judgments were not revived against the administrators of the intestate, it is contended that they have become dormant, and that the liens are lost. This assumption is unsustained by the decision of the Supreme Court to which I have referred, and is wholly irreconcilable with the provisions of the act of February 11, 1824, defining the duties of executors and administrators. That act makes it the duty of the administrators to pay: 1. Funeral expenses and costs of administration: 2: Judgments rendered against the intestate *in his lifetime*, according to their respective *priorities*, so far as the same operated as a lien on *the estate of the testator in his lifetime*. Under the provisions of this act many of the sales were made. It is not however necessary to press this inquiry, as the executions were taken out in October, 1817, and levied before the death of the intestate. When execution is taken out in the lifetime of the judgment debtor, and levied either before or after his death, there is no principle better settled in our law, then that the plaintiff may proceed to sell the property taken in execution without reviving the judgment against the representatives of the deceased.

If an alteration was made in the deed, I presume it will not be

do so, and the principal becomes insolvent, the surety is thereby discharged. Paine *v.* Packard, 13 Johns., is cited as an authority. It is true the facts set up in the special plea in that case bear a very close analogy to those stated in the notice in this; but Chancellor Kent, afterward, in Johns. Cases, 555, doubted the authority of the former case; and Platt, who concurred in the decision, three years after, in King *v.* Baldwin, says he is convinced that decision was erroneous. The case of Fulton & Matthews, 15 Johns. 433, would seem to establish the principle as laid down in Paine *v.* Packard, and in the absence of our own statute, might require of us a more minute, careful, and extended investigation of all the authorities, and the reasons on which they are founded, before rejecting its authority. From the arguments of counsel and the opinions of the court, in the cases referred to, no inference can be drawn that in New York there is any statutory enactment on this subject. The presumption is there is none, or it would clearly have been adverted to. It is the common law, they decide, to give such and such rights to the surety. But has the common law anything to do with the point now before us? For more than 74] *twenty years our statutes have contained, in substance, this provision: "That when any person or persons shall, hereafter, become bound, as surety or sureties, by bond, bill, or note," etc., "and shall apprehend that his or their principal debtor or debtors is, or is likely to become, insolvent," etc., "to require, by *notice in writing*, his or their creditor or creditors forthwith to put such bond, bill, or note," etc., "in suit; and, unless the creditor or creditors," etc., "shall, in a reasonable time, commence an action on such bond, bill, or note, and proceed, with due diligence, in the ordinary course of law," etc., "such creditor or creditors," etc., "so failing to comply with the requisitions of such surety or sureties, shall forfeit the right, which he or they would otherwise have, to demand and receive of such surety or sureties the amount," etc.

Since this statute was passed, the common law rule has not been in force in this state; and it is unnecessary to inquire what its provisions are, for it has given place to the statute, and is repealed by it, if any such rule existed, as that which would discharge a surety, who gave the creditor notice to sue the principal *by parol*, if the creditor did not proceed accordingly. The statute of Ohio requires the notice to be *in writing*. It was neither proved nor claimed on the trial that any *written* notice was given.

In the next place, we are to consider whether the argument, as proved, to extend the time for the payment of the balance due on the note, discharged the surety?

The case of Beaver *v.* Butler & Hull, Wright, 363, cited by counsel, differs from the one at bar, in this: that it was definite in its terms, and for anything that appears in the report, might have been founded on a new and good consideration to extend the time for the delivery of the deed. The time was extended beyond the time fixed by the contract for its execution, until the obligee should *demand* the deed agreed to be delivered. This demand defined its limits. In Reddish's Ex'ors *v.* Pentheuse et al., the judge who presided on the trial, instructed the jury that if time was given by the creditor to the principal, without the consent of the surety, it was a defense to the action. In 5 Ohio, 214, the plaintiff, without the consent of the surety, took the warrant of attorney of the principal debtor, entered up judgment against him, with an agreement on record to stay *execution for [75 eighteen months, and the security was holden to be discharged. These decisions are believed by this court to be correct, and not to contravene what is believed to be the substance of all the leading cases: That the contract to delay payment, in order to discharge the surety, must be a valid one; it must be definite in its terms, founded on a good consideration—such a one as the principal debtor would enforce, and which would tie up the hands of the surety, prevent him from paying his principal's debt, stepping into the shoes of the creditor, and prosecuting the principal debtor himself. Such a contract, and such a one only, will discharge the surety, if made without his consent. It deprives him of his right to pay the debt the moment it is due, and to look himself to its recovery, and he ought in justice to be no longer obligated. There is, however, but a trifling analogy between such an agreement and the one proved on the trial of the case before us. In the case at bar, there was no new consideration averred or proved, and the terms of the contract were indefinite. The plaintiff said to the defendant, pay me one hundred and fifty dollars of a debt you owe me, and I will wait awhile, a considerable time or a reasonable time, for the balance. Could the principal debtor enforce such a contract, after paying the one hundred and fifty dollars? He has only done what the law would compel him to do, without any such contract. The law, indeed, would compel him to do more—

to pay the whole amount of his debt, and not merely a part, and such payment is to the benefit and not to the prejudice of the surety. There is, there can be, no consideration for such agreement good and valid in law. Could the principal debtor, we say, enforce it? How long must the plaintiff wait for the balance? *Awhile longer?* What limit does the law fix to this contract, as proved? It is said by counsel to be a reasonable time, and a reasonable time, in a case like the present, would be extremely difficult to determine. It may be a moment, an hour, a day, or a year. Who can determine it, and on what evidence can it be determined? None was given; and if such a contract were valid in other respects it must be void, because no man can tell from the proof what it is, and it can not, therefore, be enforced. If, then, the principal debtor could not enforce it against the creditor, it follows that the principal could not enforce it against the surety, had he paid the debt and prosecuted his principal for it.

76] *It is said that the contract was executed; that the one hundred and fifty dollars was paid, and the plaintiff waited *awhile longer*, and that on the principles which govern in executed contracts, the plaintiff can not now say it was not valid. It is extremely difficult for us to perceive any analogy between this and the class of cases referred to. How the immediate parties to this contract considered it, is of little moment. If the surety has been deprived of no right, if he has been left perfectly free to manage his concerns with his principal in his own way, if his hands have not been tied, why should he complain? And with what justice can he avoid the payment of this debt?

It is also said this transaction took place in Kentucky; that a parol notice is there valid, and that the defendant in that state, in equity, would be entitled to relief, and ought, therefore, to be relieved at law here, the principles of equity in relation to principal and surety having been adopted by courts of law in their fullest extent. On this point we will occupy but a moment. A most conclusive answer to the argument is, that there was no evidence to show that the notice was given in Kentucky on the trial of the cause, nor is there such evidence with the papers now before us. The action is brought in our court; and from all the circumstances connected with the transaction, it is more probable, in the absence of express proof, that the notice was given in Cincinnati than Kentucky. The *lex loci* then governs the case.

The motion for a new trial must be overruled, and judgment entered on the verdict.

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## Henry Raguet *v.* Peter Roll.

*Scire facias* on mortgage to charge lands with execution.

An obligation, a part consideration of which is to forbear a criminal prosecution, is void. In a *scire facias* on a mortgage, the same defense may be set up that could be set up against the obligation, which the mortgage is given to secure.

*Quære:* If a mortgage to secure the payment of money does not remain an executory contract.

Reserved in the county of Hamilton.

The mortgage bears date on the 16th day of October, A. D. 1826. It was executed by the defendant to the plaintiff, and conditioned for the payment of five hundred dollars in three years. To this *scire facias* a special plea is filed, and a replication taking issue on the facts it sets up.

The plea states that at the time of the execution of the mortgage, the plaintiff threatened the son of the defendant with a criminal prosecution for larceny, in taking the money, *goods, [77 and chattels of the plaintiff, while a clerk in the plaintiff's store, unless the defendant and his son would pay him one thousand dollars; whereupon it was agreed that, in consideration, the plaintiff would not commence said prosecution, but would endeavor to suppress all investigation, the defendant would pay the plaintiff five hundred dollars, and that said mortgage was executed in pursuance of such agreement.

The cause was tried by a jury on the last circuit, and a verdict found for the defendant. The counsel for the plaintiff moved for a new trial, and assigned the following reasons:

1. That the verdict is against the law.

2. That the verdict is against the evidence.

3. That the court erred in admitting evidence to sustain the defendant's plea. This motion was reserved for decision in this court.

Fox, for the motion.

Starr and Caswell, against it.

Opinion of the court by Judge Wood:

On the trial, the testimony was amply sufficient to justify the jury in finding a verdict for the defendant; or, in other words, in finding the facts set up in the special plea true. The second point, therefore, made in the motion, may be laid out of view as overruled, and it only remains to consider whether the facts set up in the plea constitute a legal defense to the action; if so, judgment must be entered on the verdict; but if they do not, the motion must be sustained, or the judgment arrested.

Are the facts set up in the plea a bar to the action?

The law has been long settled in England, and in many of the states of this Union, that an executory contract, founded on an agreement to compromise, stifle, or conceal a felony, can not be enforced. Chit. on Con. 219; 2 Kent's Com. 366; 116 Mass. 368. Kent says, the consideration of an agreement must not be repugnant to law, sound policy, or good morals. *Ex turpi contractu actio non oritur;* and no person, as far back as the feudal ages, was permitted to stipulate for iniquity. That contracts are illegal when founded on a consideration *contra bonos mores*, or against the principles of sound policy, or founded in fraud, or in contravention
78] *of the positive provisions of some statute law. In action upon a bond given for compounding a prosecution for perjury, it was argued in support of the action, that no averment could be admitted of the bond having been given for such a consideration, because it did not appear in the condition. But to this it was answered by Lord Chief Justice Wilmot: "That the manner of the transaction was to gild over and conceal the truth; and whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and show the transactions in their true light. This is an agreement to stifle a prosecution for willful and corrupt perjury—a crime most detrimental to the commonwealth; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice. This is a contract to tempt a man to transgress the law; to do that which is injurious to the community; it is void by the common law, and the reason why the common law says such contracts are

void, is for the public good." Collins *v.* Blantem, 2 Will. 341, cited in Com. on Con. 62. On the trial, the plaintiff's counsel conceded the application of these principles, where the contract is executory, but ingeniously and ably argued, that the mortgage was not of that character. What we understand by an executory contract is where something remains *in fieri*, for if all the conditions are performed, it is executed, and not executory. This mortgage is conditioned for the payment of five hundred dollars. Its operation is to secure a lien on the land it covers for that amount. The condition is a contract under seal—a covenant to pay. The amount has not been paid, and this *scire facias* is instituted to charge the lands with execution for its recovery. Something, then, remains *in fieri*—the payment of the money. To obtain such payment, the plaintiff calls on the court to aid him to enforce this contract. The contract, then, is executory, for the plaintiff is yet to receive the reward of his promise to endeavor to stifle the prosecution. But suppose we are wrong in this view of the case, and that the original contract was executed in giving the mortgage, and suppressing the prosecution; the law is, in executed contracts, that the parties are to be left precisely as they are found. The law lends no aid to either plaintiff or defendant. The plaintiff may possess his mortgage, he may receive the amount of money in its *condition secured, but he must do so without the aid of [79 the law.

It is now said, however, that such contracts are lawful in Ohio, because no statutory provision makes them unlawful. This argument is answered by the court, in a case between these parties, in 4 Ohio, 418. The principles laid down by Kent, before cited, and in 2 Har. Ev. 87, are fully recognized; that "any contract, the consideration of which is to conceal a crime, or stifle a prosecution, is necessarily repugnant to public policy; and it is a settled rule of law, that all contracts, whose consideration is contrary to public policy, are void." The court say further, "it is unnecessary to inquire, whether such contracts are positively prohibited by law; or whether it is in all cases the legal or moral duty of an individual cognizant of the commission of a crime, to make a disclosure to the proper authorities. Admitting the existence of cases, where silence would be excusable, it by no means follows, that an express contract, to conceal the offense, or smother a prosecution, must be sanctioned by law, or enforced by the judicial

tribunals of the county." As a general rule, it may, however, be truly said, that public policy requires of every individual citizen, as a civil duty, to assist, as far as is reasonably within his power, in the administration of criminal justice, and when any agreement is calculated to prevent the faithful discharge of this duty, public policy declares it void.

It is said, that the agreement to stifle the prosecution, is not the only consideration, but that the mortgage was given to secure the amount honestly due, for stolen property, also. This may be so, but in Croke. Eliz. 199, and Sid. 38, cited in Com. on Con. 34, it is said, "if one of the considerations is unlawful, that vitiates the whole, and the plaintiff shall recover for nothing." This rule is certainly very properly applied to the present case, where a part of the consideration is clearly *illegal*, and no part of it, from any evidence we have heard, to be distinguished from the rest; the entire agreement must be considered void. The motion for a new trial is overruled, and judgment must be entered on the verdict for the defendant.

Judge HITCHCOCK, dissentient:

Whether a mortgage be an executory or an executed contract is 80] not a question necessarily involved in the decision of *this case. If it were, there would probably be some difference of opinion in the court.

This is a proceeding under the act of January 2, 1810, "providing for the recovery of money secured by mortgage." The rules prescribed by that statute must govern the case. At the close of section 1, it is provided, that "upon the return of the *scire facias* it shall be lawful for the defendant or defendants to come in and plead payment, or satisfaction for all or any part of the money demanded by the plaintiff or plaintiffs, *or any other legal plea in bar, or avoidance of the deed or money therein demanded*, as the case may require, and thereon the parties shall proceed to issue and trial as in other cases. 1 C. S. 645. From this I infer that the legislature intended, that to a *scire facias* upon mortgage, the defendant, notwithstanding the form of security and of action, might plead any plea which would operate as a bar to a suit brought upon the instrument, to secure the payment or performance of which the mortgage was executed. This is the only rational construction, as it seems to me, which can be given to this clause of the statute.

The simple question then is, whether the facts, stated in this plea are sufficient to bar an ordinary suit brought for the recovery of the money, to secure the payment of which this mortgage was executed. This question was fully considered in a case between these same parties, 4 Ohio, 400, in which it was held that facts similar to those here pleaded constituted a bar to an action upon a promissory note. Upon the authority of that case, taken in connection with the statute before referred to, I am induced to concur in the opinion that the motion for a new trial be overruled.

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LAFAYETTE BENEFIT SOCIETY *v.* WILLIAM LEWIS.

**A contract to pay more than six per cent. per annum interest, can not be enforced in the courts of law of Ohio, under the laws in force in November, 1832.**

RESERVED in the county of Hamilton.

This is an action of assumpsit, upon a promissory note in which there is a judgment by default, and the only question now to be considered is as to the amount of damages which the plaintiff is entitled to receive.

The case is submitted without argument.

*Judge HITCHCOCK delivered the opinion of the court: [81

The note, which is the foundation of this action, is in the following words: "Cincinnati, November 20, 1832. One year after date, we jointly and severally promise to pay to the order of the Lafayette Benefit Society of Cincinnati, ninety-eight dollars and twenty-five cents, for value received; but if not promptly paid, then we further promise to pay two and one-half per cent. per month until paid."

This note was signed by the defendant and two others, and not being paid according to its terms, the plaintiff now seeks to recover the principal, together with interest, at the rate of two and one-half per cent. per month, or thirty per cent. per year.

Whether he is entitled thus to recover, must depend upon the construction of the statute of the state "fixing the rate of inter-

est." This is a subject upon which the legislatures of the several states of the Union, with, perhaps, one or two exceptions, have acted; and this course of action is in accordance with the practice of the civilized world. Many, it is true, have doubted the policy of laws of this description; but none, I believe, have the hardihood to deny that it is within the appropriate sphere of legislative action, unless where such action is prohibited by constitutional provisions. But with the policy of this or any other law, the court have nothing to do. Duty requires us to ascertain what the law is, and having ascertained, to declare it, regardless of consequences.

The law now in force, "fixing the rate of interest," was enacted January 12, 1824, 29 Ohio Stat. 451, and provides "that all creditors shall be entitled to receive interest on all money, after the same shall have become due, either on bond, bill, promissory note, or other instrument of writing; on contract for money or property; on all balances due on settlement between parties thereto; on money withheld by unreasonable and vexatious delay of payment; and on all judgments obtained from the date thereof; and on all decrees obtained in any court of chancery, for the payment of money, from the day specified in said decree for the payment thereof; or if no day be specified, then from the day of the entering thereof, until such debt, money, or property is paid, at the rate of six per cent. per annum, and no more." At the last term of this court, this case was under consideration, and a majority of 82] the judges holding the court decided, that in a case like *the present, the plaintiff would be entitled to recover interest according to the terms of the contract. At least I so understand the decision, although it is said that after the principal sum is due, no more than six per cent. can be charged; and in the case before the court, by the terms of the contract, no interest at all was to be charged, if the principal was promptly paid; but if not promptly paid, then interest at the rate of two and one-half per cent. per month. The decision sustains the position, that in all cases, interest can be collected according to the terms of the contract. Since that contract for the payment of interest, however unconscionable, must be enforced in a court of law. Reddish's Ex'rs v. Watson, Holcomb, and others, 6 Ohio, 510.

Had the decision been made by a full court, we should have considered ourselves bound by its authority; but as there were only three judges present, and one of those dissenting, it seems to us

proper again to reconsider the subject, and to inquire as to the correctness of this decision.

In construing statutes, it is proper to look to the old law, the mischief and the remedy, and so to construe as to carry into effect the intention of the law-making power, in removing the mischief, and applying the remedy, so far as it can be done consistently, with the phraseology of the statute to be construed. The law in force, in this state, at the time of the enactment of the statute of January 12, 1824, was the act of December 29, 1804, entitled "an act fixing the rate of interest, and for preventing usury." 1 Chas. Stat. 484. The act of January 12, 1824, is a literal copy, so far as it goes, of that of December 29, 1804, with this exception, that in the former, decrees in chancery for the payment of money, are put upon the same footing, as to interest, with judgments at law, whereas in the act of 1804, decrees in chancery are not noticed. But in the act of 1804, there is this additional clause: "And if any person shall demand or receive more than six per cent. per annum, on any contract, debt, or demand whatever, such person shall forfeit the whole amount of the debt, on which such illegal interest was charged or received, on due proof thereof being made, before any court having jurisdiction thereof, the one-half thereof to be paid into the county treasury, for the use of the county, and the other to the informer, or the person prosecuting." If there is a prohibition in the law of 1804, against receiving interest *at [83 a greater rate than six per cent. the same prohibition is contained in the law of 1824. In both, it is declared that "all creditors shall be entitled to receive interest on all money," etc., "at the rate of six per cent. per annum, and *no more*." The right to receive this much, is in both statutes explicitly, and in the same identical words, declared, and it is as explicitly declared that "*no more*" than this shall be received. In the law of 1804, for the violation of this prohibition, a penalty is provided. And herein consists the only difference between the two acts; the act of 1804 contains a *sanction*, while that of 1824 does not. In other words, for a violation of the former, a penalty might be inflicted, while the latter may be violated with impunity. The wisdom of passing any law, without a sanction to enforce its observance, may well be questioned, although that the moral obligation of the citizens, is as strong to obey one as the other, can not be questioned. And cer-

tainly no court will disregard a law, because those who offend against its provisions are not to be punished.

It will be observed that by the law of 1804 a contract, providing for a greater rate of interest than that therein prescribed, is not declared void, although a penalty is inflicted upon such as shall demand or receive a greater rate. By the construction put upon that act a contract, stipulating the payment of a greater rate of interest than six per cent., was not void. Such contract might be enforced so far as to compel the payment of the principal sum and interest at the rate of six per cent., but "no more." In no one instance within my knowledge was it held that the reservation of a greater rate vitiated the contract. At the same time if any individual presumed to demand or receive a greater rate, and suit was brought against him, under the statute, he was liable to the penalty.

It was with a view to, and in consequence of, this construction that the court say, in the case of Smith v. Parsons, 1 Ohio, 236, at page 239, "the state may, for instance, pass laws preventing usury, and fixing the interest of money, should such a law enact that the lender may receive from the borrower six per cent. interest or more; and should an after contract contain an express promise to pay ten per cent., such a contract, although voluntarily made for the payment of a specific sum, would be void in part, and, in many 84] of the *states the obligation of the contract would be entirely destroyed." In speaking of "many of the states," reference is had to those states where, by express enactment, usurious contracts are declared to be void.

Such, then, was the law of 1804, as understood by the courts of the state. What were the mischiefs complained of? Not that the usurer was prevented from enforcing his unconscionable bargains; but it was supposed to be unjust to empower an individual who had himself sustained no injury to prosecute another for the recovery of a penalty. True there were then, as there are now, those who could declaim upon the injustice of usury laws; but the only mischief complained of by the community at large was the one which has been specified; and to remedy this the law of 1824 was enacted.

And what was the change made by this new enactment? It has already been pointed out. It was merely the re-enactment of the old law, excepting the penal clause, with an alteration of the title to

make it conform to the body of the act. In truth it was nothing more than the repeal of the penal clause of the act of 1804. The act of 1824 received a construction by this court, on the circuit, immediately after its passage—a construction concurred in by all the members of the court. It was held, as under the former law, that by suit in court "*no more*" than six per cent. interest could be recovered, let the rate reserved in the contract be what it might beyond that amount. So far as the contract contained a promise to pay a greater rate than this, it was held to be void, but no further. As the words of the new law were identically the same with the corresponding part of the old, the court could not see upon what principle a different construction could be put upon them. Upon the propriety of this construction there was no difference of opinion with the members of the court until after the year 1830 at least; and this circumstance accounts for the fact that no case previous to that time was either reserved for the court in bank or reported. This construction was well understood, and that it was in conformity with the intention of the legislature we have reason to believe; otherwise the subject would not have remained unacted upon for the term of ten years. The law itself would have been explained by the legislative authority, and expressed in words with respect to which there could be no controversy.

Was this a correct construction of the law? In the case of Reddish's Executors *v.* Watson, Holcomb, and others, it is decided it was not, 6 Ohio, 519. In this case, the judge, in delivering the opinion of the court, says, "a law like ours, prescribing a rate of interest where money due is withheld, and the parties have omitted to fix the rate in their contract, furnishes no rule for the contract; it merely supplies the rule of compensation in cases where the parties have omitted to agree upon one for the unreasonable and vexatious delay of payment."—p. 516. But is this a fair inference from the words used? It seems to me not. Had such been the design, how easy would it have been to express that design. It might have been done in explicit terms, and in the use of as few words as are contained in the present law. The law purports to fix the rate of interest, not for a particular class of creditors, but for "*all creditors.*" And it fixes the rate of interest upon "all moneys." True, it speaks of "money due," as did the act of 1804, and that of 1799, preceding it; but it is for this reason, the

collection of money can not be enforced until it is due, and, when collected, the interest attaches at the rate prescribed by the statute.

The judge again says, "the act does not purport to prescribe the rate of interest for money, before the same shall fall due. It speaks only of interest to be allowed after the same shall become due." As before remarked, it is similar in this respect to the acts upon the same subject, of 1799, and 1804. In the case of Brockway *v.* Clark, 6 Ohio 50, the same judge says, "until the year 1824, we had a statute fixing the rate of interest at six per cent. per annum, and providing punishment for usury. This law was held to make void so much of contracts as stipulated for more than the legal rate of interest." If under the law of 1804 so much of the contract as relates to the excess of interest, over and above six per cent. per annum, was void, why should it not be void under the law of 1824? In both, the rate is fixed at six per cent. and in both it is declared that "no more" shall be received. In neither is there any express prohibition against making a contract for the payment or receipt of a greater rate of interest than six per cent., although under the act of 1804, if any man shall "demand or receive" more than this, he is subjected to a penalty. It is not the making of the contract, but the receipt of the money which constitutes the offense.

86] *It seems to me that the error of the judge consists in the assumption, that inasmuch as there is no prohibition against contracting for the receipt of a greater rate than six per cent. therefore such contract is obligatory and may be enforced. But so long as the law prescribes that the "creditor shall be entitled" to receive "*no more*" than this rate, I do not feel authorized to allow him at the rate of fifteen, twenty, or thirty per cent. per annum.

In the case of Reddish's Executors *v.* Benham, etc., reliance seems to be placed upon the title of the act. The title to the act is no part of the act. It may sometimes aid in the construction. When taken in connection with other parts, it may assist in removing ambiguities, where the intent is not plain. But where the words of the enacting clause are clear and positive, recourse must not be had to either title or preamble. 2 Cranch, 386. In the act now under consideration, the words of the enacting clause are clear and positive. There is no room left for construction, there is no appearance of ambiguity, unless this law is to be construed in connection with the positive laws of other states and countries, upon

the subjects of interest and usury. But if we resort to title, I do not feel the force of the argument drawn therefrom. In the law of 1804, the legislature prescribe the rate of interest, and in addition they prescribe that if any person shall demand or receive a greater rate, such person shall be subjected to a severe penalty; and they entitle this law, having the double object in view, "an act fixing the rate of interest, and for preventing usury." In 1824, they have the same subject again under consideration, and they conclude to continue so much of the previous statute as relates to fixing the rate of interest, and to discontinue that part of it which relates to the punishment of those who shall offend against its prohibition. They act accordingly, and entitle their law, "an act fixing the rate of interest" merely. Here is a change in the title, and the reason of the change is obvious. It is that the title may conform more precisely to the body of the act. But it does not follow to my mind, that because the words "and for preventing usury" are omitted in the title to the act of 1824, therefore, it was the intention of the legislature to legalize usury.

But suppose the subject had never been acted upon by the legislature before the passage of the law of 1824—that body *then [87 say "all creditors shall be entitled to receive on all moneys due," etc., "interest at the rate of six per cent. per annum, and no more." Can it be doubted that, if any person presumed to receive a greater rate of interest than this, such person would be thought to have violated the law? Should it be contended that the intention of the law was to allow creditors to receive six per cent. interest when no rate was agreed upon, and as much more as they thought proper to secure by express contract? Should it be insisted, that in saying that *no more* than six per cent. should be received, it was intended that more might be received, provided a debtor could be induced to promise to pay more? Before these positions could be successfully maintained, it does seem to me that the meaning of the language must be changed. New rules of construction must be introduced, and new principles adopted. Now we are bound to give the same effect to the words used in this act fixing the rate of interest as if this were the first statute enacted upon the subject, if it can be done consistently with the well known rules of construing statutes.

The object of this statute was to apply a remedy to the existing mischief. As before remarked, the mischief in the old law was,

that it created a forfeiture of the debt for the violation of its provisions. The only change made was in removing this feature. And this change can hardly require a change of construction as to that part of the law which remains. It never could have been the intention of the legislature to remove all restriction from the usurer; otherwise that intention would have been clearly expressed.

Since this law provides expressly that "*no more*" than six per cent. per annum shall be received by a creditor as interest, we are unwilling so far to disregard it, as to allow that creditor, by a judgment of this court to receive thirty per cent., as claimed in this case.

We are satisfied with the construction which was put upon this law immediately after its enactment, believing it to be in strict conformity with the intention of those by whom it was enacted. The case of Reddish's Executors *v.* Watson, et al., is in contravention of that construction, and we do not feel ourselves bound by its authority.

88] Judgment will be entered in favor of the plaintiff for the *principal of the note, together with six per cent. interest from the time it fell due

Judge Wood dissented.

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## Lessee of the City of Cincinnati *v.* Commissioners of Hamilton County.

A special verdict finds a dedication of grounds for public uses, made by proprietors, laying out a town where no county was established, and that the county, when organized, came into possession of the dedicated grounds, and occupied them for a court-house and jail, with the consent of the people of the town; and further finds: "That in so occupying said property, it was strictly in accordance with the object had in view by the original donors," it is a finding of the right in the county.

This is an ejectment reserved in the county of Hamilton. The object of the action was to recover the possession of a certain piece of ground, situated in the city of Cincinnati, bounded on the east by Main street, on the north by Fifth street, on the west by Walnut street, and on the south by an alley, running from Walnut to Main street.

Upon the trial of the case at the May term of this court, 1835, the jury returned the following special verdict:

"The jury find: 1. That the original proprietors of the town of Cincinnati did dedicate the property in dispute for public uses.

"2. That the county came into the possession, with the consent and approbation of the people of the town, and did occupy it with the consent of the people of the town, up to the time the stone court-house was burnt, in 1813 or 1814.

"3. That in occupying said property, it was strictly in accordance with the objects had in view by the original donors.

"4. That so soon as said property was appropriated to private use, so soon was the object of the original grantors perverted and departed from.

"And if upon these facts, the court is of opinion the law entitles the plaintiff to recover, then we find the defendants guilty. But if, on these facts, the court is of opinion that the law is with the defendants, then we find for the defendants."

B. Storer, for defendants:

A great deal of discussion has been saved by the finding of the jury, and the admissions on the part of the plaintiffs and defendants, that are necessarily involved in the facts stated in the special verdict.

*The right to dedicate, a dedication made, and that such [89 dedication divests the proprietor of all his interest in the estate, is, it seems to us, clearly established. What is the effect of such dedication must always be determined by the purpose for which it was made, qualified or explained, of course, by the situation of the community, and the locality of the place where the grant or appropriation is to be enjoyed.

In the present case the jury have found that the original proprietors of the town of Cincinnati dedicated the property claimed by the plaintiffs to public uses.

2. That the county came into possession with the consent and approbation of the people of the town, and occupied and enjoyed the property, with the consent of the people of the town, up to the time the stone court-house was burned in 1813 or 1814.

3. That in so occupying said property, it was strictly in accordance with the objects had in view by the original donors.

4. That as soon as said property was appropriated to private

uses, so soon was the object of the original grant perverted and departed from.

Upon those facts the court are now asked to decide for whom is the verdict upon principles of law. We insist it is substantially a verdict for the defendants.

In the first place, it must be conceded that if the original proprietors dedicated the property for the use of the defendants, even if the use itself should be perverted, the estate can not revert to the donors. A court of equity can alone correct the evil, and decree that the purpose intended by the dedication shall be substantially pursued.

In the case of Barclay et al. *v.* Howell's Lessee, 6 Peters, 507, the Supreme Court of the United States say, "if this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a court of chancery, to compel a specific execution of the trust, by restraining the corporation, or by causing the removal of obstructions. But, even in such a case, the property dedicated would not revert to the original owner. The use would still remain in the public, limited only by the conditions imposed in the grant."

90] The doctrine of the dedication of land to public uses *depends upon the same principles as a grant to an individual; the only difference is, that in the one case no grantee need be named; in the other, it is essential. In both, the act of cession estops the donor or grantor, and he is forever rebutted.

There is no such thing as a conditional dedication, as to title merely; the whole right must pass, as the whole control over the estate is given up by the transfer to those who are to enjoy it. Cincinnati *v.* White, 6 Peters, 413.

If such is the condition of the original proprietors, let us inquire, in the second place, in what particular is the situation of the present plaintiff made to differ. If the city had the estate, and dedicated it to the county for public purposes, the rule already referred to must certainly hold; for all that can be claimed, in one view of the case, is, that the city sustains such a relation. If the county held by the permission of the city merely, and the right to the property was in the city at the time the occupancy commenced, then the application of the principle we have before stated is manifest.

But it is found that the occupation, though commenced with the consent of the people of Cincinnati, was in *strict conformity* with the object had in view by the original donors. The occupation being by the county, and for public purposes, it could not have been for the immediate benefit of the city, and the idea that the donation was ever intended to be for the city, is thereby precluded.

We can not imagine that the dedication could be to the city, while the use was secured to the county; nor can we conceive how the city could permit, even if the property was given to her citizens, its exclusive use to be enjoyed by a body in which she had no direct interest or participation.

It is urged, however, that the term public uses must be construed to mean the purposes of the town, or the people of the town. This assumption is predicated upon the opinion of this court, in the case of Brown *v.* Manning, 6 Ohio, 298. On examining that case, it will be found that the facts were peculiar.

The question was, not to whom, as donees, the property was appropriated, as the donation was proved, and its effect only disputed. A public square was laid out, lots sold, and streets bounded upon it. The dedication was notorious, and acquiesced in by the original donors for several years. They attempted to resume their former estate, and their right to do so was questioned, [91 in chancery, by one of the purchasers of the lots. It was held that the dedication once made could not be recalled, that the property inured to the public, and was forever lost to the first proprietor.

The court, among other things, decided, in this case, that the term "public square" must mean a square for the benefit of the town, and could not be extended to embrace any other construction. Suppose it is granted, for a moment, that the expression alluded to must be thus limited, how does it affect the present case? Here the jury have found, that the dedication was made for *public purposes*, and that the property was occupied until 1813, in strict accordance *with the intention of the donors.* The term "public purposes" has an extended meaning; it must, to give any effect, be explained by the situation of the projected town, where the dedication is made; and in this view, the use of public ground for a court-house and jail, would seem as consistent with the original intention of the proprietors, as any other public purpose whatever.

Cincinnati was regarded as already the seat of a county, when the dedication was made; and it was natural to reserve for the county an eligible site for the public buildings.

We have thus presented the only point which, it seems to us, is involved in the verdict. If a motion is made for a new trial, it can only be argued at bar, as the evidence adduced at *nisi prius* is voluminous, and can not be embodied, without great difficulty, in the record; besides, the evidence offered on trial has not been noted in the case.

I leave the case, then, with the further remark, that, as it is competent for a chancellor to compel the original donor, if he attempts to resume his estate, to releasd it to the public, that the purposes for which it was granted may be enjoyed; it is only competent, on the other hand, we conceive, as a corollary from the reasoning referred to, for the donor, if his dedication should be perverted by the public, to ask the aid of a court of equity, to restore the uses to their appropriate purposes. No action of ejectment can be brought, as the title is gone forever from the donor.

Reynolds' Lessee *v.* Commissioners Stark Co., 5 Ohio, 204; Smith *v.* Huston, et. al., 6 Ohio, 101.

HAMMOND and WORTHINGTON, for plaintiff:

This is an ejectment, and comes before the court upon a special 92] *finding, by the jury, upon a trial, in Hamilton county. The question is, whether the plaintiff or the defendants are entitled to judgment, on the finding.

It is found as follows:

"We, the jury on our oaths, do find,

"1. That the original proprietors of the town of Cincinnati did dedicate the property in dispute for public uses."

Let us examine the extent and effect of this finding.

When was the town of Cincinnati laid out? What were the public uses for which the dedication was made?

The finding of the jury being general, resort must be had, for these facts, to public history, and to official records.

It is, we conceive, matter of public history, that the town of Cincinnati was first laid out in the early part of the year 1789. The state of the county, at that time, is also matter of history—its legal condition, in reference to municipal law and municipal jurisprudence. There were no county locations, no county rights, to

which the dedication could possibly refer. At that time, the whole territory comprehended one county—the county of Washington was proclaimed July 27, 1788.

The county of Hamilton was proclaimed January 2, 1790. Swan's Land Laws, 494. The dedication for public uses, in general terms, must be understood and interpreted for the public uses of the town. By reference to the certified copy of the town plat, among the papers, and the explanatory notes accompanying it, the fact appears, that the dedication was made "for public uses," in terms. The note is in these words:—"The town lots given for public uses are numbered and painted with red ink."

There was then no public use but that of the town. In Brown *v.* Manning and others, 6 Ohio, 298, this point, we claim, was fully decided. The doctrine of dedicating town lots for public uses, was elaborately discussed by counsel, and as elaborately considered by the court. This appears from the numerous authorities referred to by the judge who delivered that opinion. The result of which clearly is, "that a dedication, in terms, 'public square,' accompanied with private conveyances referring to the public square, is valid, and inures for the benefit 'of the inhabitants of the town.'"

The verdict here finds, that the property in controversy was dedicated "for public uses." These can only be for the town. It follows, that the dedication is valid—that the town *was the [93 beneficiary, and must, consequently, have had the original right. Every position taken, by the judge delivering the opinion of the court in Brown *v.* Manning, et al., strongly sustains this dedication, as made for the benefit of the town of Cincinnati.

The second finding of the jury also, sustains this position, incontrovertibly. It runs thus:

"2. That the county came into possession with the consent and approbation of the people of the town, and occupied and enjoyed the property with the consent of the people of the town, up to the time the stone court-house was burned, in 1813 or 1814."

Here, the use of the county is expressly referred to the consent of the town. The occupation, for a jail and court-house, was recognized as a public use by common consent. There was no assent to aught but a public use, mutual to the town and to the county. And of this, the jury find:

"3. That in so occupying said property it was strictly in accordance with the objects had in view by the original donors."

That is: it was strictly in accordance with the objects of the original donors, that the town should permit the county to occupy the lots granted "for public uses," for the public use of a court-house and jail. But this permission or consent, of the town, vested the county with no right beyond the legitimate "public use." And so the jury find:

"4. That as soon as said property was appropriated to private uses, so soon was the object of the original grant perverted and departed from."

The whole finding of the jury is not so full as could be wished. No exception is taken to it by the defendant's counsel, and it plainly concludes the proposition, that, up to the burning of the stone court-house, in 1813 or 1814, the county occupied the ground in question for a court-house and jail. Subsequent to that period the county removed the court-house and jail, and rented the ground upon private leases, reserving rents to the county as landlord. In doing this, the jury find the grant was departed from. Conceding this fact, "the grant was perverted and departed from," what is the legitimate result?

The jury find, that "the object of the original grant [was] per-94] verted and departed from." What "original grant?" It *matters not whether the departure was from the original grantors to the city, or from the original grantors from the city to the county.

What was the consequence of the departure from this grant? Most certainly it could not invest those who departed from it with a higher estate than they before possessed. Who made the departure? The county. The consequence, then, would seem to be, upon the hypothesis of the counsel for the county, that a forfeiture of the estate was worked. Who can take advantage of that forfeiture? who can make gain or loss by it? Is this the privilege of the original donors, the founders of the city? That is not pretended. The case of Brown *v.* Manning et al., already referred to, is decisive against that. The dedication for "public use" divested the donors of all claim. It invested the donees with title for the legitimately contemplated uses, and these the donees can not forfeit to the original donors. The donees are invested with a trust they can not forfeit. Such is the established doctrine of the American cases, fully recognized and forcibly illustrated in the

case of Brown *v.* Manning et al., decided at the last term of this court and already repeatedly noticed. And such is the doctrine of the cases there cited by the counsel on both sides and the judge who delivered the opinion.

The county ceased the public use of the grounds in controversy, removed the public buildings, subdivided the ground, and made permanent leases of it as a private landlord. In doing this, the jury say, "the original grant was perverted and departed from." What is the consequence of this perversion and departure? We say it reinvests the city with possession, to be again disposed of for "public use."

The county has no original right. The right of the city was perfect for public uses, not for private uses. The city yielded a public use to the county. The county "perverted and departed from it." Consequently the city may, nay, is in duty bound, through its official agents, to resume the use and again direct it to its legitimate objects.

The city may assert its rights in an action of ejectment. It is not driven to a bill in chancery. The law invested the county with the naked legal title, subject to the rightful use. See 1 Chase Stat. at Large, 202, sec. 4, of the enactment of Dec. 6, 1800.

*In Cincinnati *v.* White, 6 Pet. U. S. 431, the Supreme [95 Court of the United States expressly decide, in reference to a different dedication, that of the Cincinnati common, made by these same dedicators, in the same act of dedication, under which the city claims, in this case, that it was not necessary to sue a bill in chancery. That where the right of possession, of use, was in the claimant, under a dedication like this, he could maintain ejectment. This accords with the plainest rules of common honesty and of common sense.

The occupation of the county was neither temporary nor conditional. It was an occupation consistent with a publicly dedicated use, by the permission of the actual *cestui que use*, who could lawfully permit such occupation. Ceasing to occupy consistently with the use, the permission to occupy could no longer be made obligatory by the *cestui que use*, if he sought to do so. Did he refuse to take legal measures to resume the possession, chancery, on a proper application, would compel him to take those measures. The true remedy is an ejectment, regarding the permission to occupy as at an end. The case is not one of condition, or of for-

feiture; but of permission in reference to a *public use*. The use, being confessedly disregarded, the permission can not be continued. If the right of the plaintiff to have judgment, on the verdict, is not conclusive, it must result from a defective finding. In that case there should be a *venire de novo*. Enough is disclosed to show that the defendants have no title. It is supposed there is enough before the court to enable them to decide the whole case.

There is no motion for a new trial. No suggestion of such a motion appears, except in the brief of the defendant's counsel.

Judge HITCHCOCK delivered the opinion of the court:

The finding of the jury in this case is not as full as could have been wished, and it is not, perhaps, improper, according to the suggestion of the plaintiff's counsel, to resort to public history, and to official records to ascertain facts which have not been found by the jury.

The premises in controversy constitute four lots in the city of Cincinnati. Subsequent to the organization of the county of Hamilton, these lots were occupied by the county, for purposes of 96] county buildings, and continued to be so *occupied, until the court-house referred to in the special verdict was burnt. After this accident, the lots were leased to individuals, and the rents were paid to the county. Another fact, which is deemed material, by the plaintiff's counsel, is, that at the time the town of Cincinnati was laid out, there was but one county in the territory now constituting the State of Ohio, to wit: the county of Washington. The county of Hamilton was not proclaimed, until January, 1790—whereas the town of Cincinnati was laid out in 1789.

The jury find, in the first place, that this property was dedicated by the original proprietors of Cincinnati, for public uses. This, if the lands "are used for the object, and in the manner intended by the owner, inures as a grant," 6 Ohio, 303. The original owner is thereby divested of his title, although there is no specific grantee in whom the title can vest. But to avoid any difficulty on this account, provision was made at an early period of our history, by legislative enactment, vesting in the county the fee in lands appropriated by the proprietors of towns for public uses. On December 6, 1800, a law was enacted by the territorial legislature, 1 Chase. Stat. 201, requiring the proprietors of any town that had

theretofore been, or that thereafter should be laid out within the territory, to cause a true and accurate map or plat of such town, to be recorded in the recorder's office of the proper county—and the same law provides, that the fee of any, and all parcels of ground *designated or intended* to be for public uses, should, by such recording be vested "in the county, in which such town is, in trust to and for the uses and purposes therein *named expressed, or intended*, and for no other use or purpose whatever." Upon the recording of the plat of Cincinnati, the fee of the lots in controversy, was vested in the county of Hamilton—not to be disposed of in such a manner as the authorities of the county might deem most expediment and proper, but in trust for the uses "*intended*" by the proprietors of the town.

What were these uses? The jury find "that the county came into possession *with the consent and approbation of the people of the town*, and occupied and enjoyed the property, *with the consent of the people of the town*, up to the time the stone court-house was burned, in 1813 or 1814," and "that in so occupying said property, it was strictly in accordance with the objects had in view by the original donors."

*There is, perhaps, some little difficulty in arriving at a [97 satisfactory conclusion as to the meaning of the jury in this part of the verdict. The inference drawn from it by the counsel for the plaintiff is, that it was in accordance with the object of the original donors, that these lots might be used for the public use of a court-house and jail, provided the people of the town would permit. They argue upon the hypothesis that the use "*intended*" must have been the use of the town; and insist that the finding of the jury, that the property thus used was so used "with the consent of the people of the town," sustains this position. But is this a fair exposition of the verdict or of the intent of the jury? We think not. We understand the jury to say, that these lots were dedicated for public use, for the purpose of erecting thereon a court-house and jail. They had actually been used for this purpose, and the jury find, "it was strictly in accordance with the objects had in view by the original donors." If we are correct in this exposition of the verdict, then it follows, that this property was "intended" for the use of the county, rather than of the town. Counsel insist that such can not be the meaning of the jury, nor could it have been the intention of the donors, because when the

town was laid out there was no other county in the territory than the county of Washington. The fact is correctly stated, but it by no means follows that it could not have been intended that this property should be for the use of a county. The same history to which resort is had to prove this fact, will also show that it was no uncommon thing for the owner of lands, when laying out a town, to appropriate certain lots for the use of a court-house and jail, in anticipation that at some future period a county would be erected of which the town then laid out would be the county seat; and it would have been strange if the proprietors of Cincinnati had not appropriated lots "intended" for this purpose. The verdict of the jury ascertains the fact, that the property in controversy was dedicated for this purpose, and for a time was used for this purpose. Upon the principle of dedication, the right of possession was in the county so long as it was thus used; and from the time of recording the map of the town plat, the fee was vested in the county, in trust for the uses intended by the donors.

The jury next find, "that so soon as said property was appropri-
98] ated to private uses, so soon was the object of the *original grant perverted and departed from." Taking this to be the fact and the law, for it seems to be rather matter of law, it by no means follows that the plaintiff has a right of action. In this, as in every other action of ejectment, the plaintiff must recover upon the strength of his own title. He must show a right of possession, at least a better right than the defendant. It will not do for him to rely upon the weakness of his adversary's title, unless he can show some right in himself. In the case before the court, the legal title, the fee of the land, is in the county. Were we to admit that a *cestui que trust* could maintain ejectment against his trustee, still the lessors of the plaintiff do not sustain that relation to the defendants. This property is not holden by the county for their use, but according to the verdict of the jury, it is holden for the use of the county itself, for the purpose of erecting thereon public buildings. At least it was so holden while those buildings remained; and if since that time it has been otherwise appropriated it is not for the lessor of the plaintiff to complain, for she is not thereby curtailed in any of her rights.

In the opinion of the court, the law arising upon the special verdict is with the defendants, and judgment must be entered accordingly.

## Oliver Ormsby's Adm'rs v. Bakewell and Johnson.

In chancery, a party having such an actual interest in the suit as that the whole defense must be made through him and his transactions, and who may be subject to a decree for costs, can not be examined as a witness.

Arbitrators are constituted by the parties, chancellors, judges, and jurors; and have jurisdiction of the law and of the fact. Their award is final, and can not be impeached for error. Nothing but fraud, in the parties or in the arbitrators, can be alleged to avoid it.

It is allowable for arbitrators, after hearing the parties and their proofs, to meet for consultation and decision, without giving either party notice of such meeting.

This is a suit in chancery, brought from Hamilton county.

On April 22, 1828, Bakewell and John H. Page, the agent of Ormsby, entered into an agreement in writing, by which it was agreed that Bakewell should, from time to time, for one year from the making of the agreement, furnish to Page funds to purchase wheat to be manufactured in Ormsby's steam mill at Cincinnati, for Bakewell; that Page should purchase the wheat, and for every five bushels, Bakewell should have a barrel of superfine flour—Bakewell to pay for manufacturing in proportion to the price paid for the wheat. When wheat cost fifty cents a bushel, he paid sixty cents a barrel for manufacturing; as much less than fifty cents as should be paid per bushel for wheat, so much more should be paid per barrel for manufacturing. The wheat in the mill, *when the contract was made, was to be manufactured. [99 No other wheat but that purchased for Bakewell was to be manufactured by the mill during the year, unless for the owners of the wheat, and for the owner not more than five thousand bushels, for which Bakewell was to be allowed twelve and a half cents for every barrel so manufactured, and twelve and a half cents per barrel on all flour retailed at the mill for Ormsby within the year. Bakewell from time to time delivered to Page, the agent of Ormsby, money to purchase wheat, and Page, as the agent of Ormsby, from time to time delivered to Bakewell flour under this contract, until the latter part of December, 1828, at which time it was agreed by them that no more money should be advanced by Bakewell, and that the party's rights under the contract should be such as

they would have been, had that been the end of the year for which the contract was made. In April next after, the parties differing as to the amount which Ormsby should pay to Bakewell, in consequence of their transactions under the contract, referred their controversy to the arbitration of Charles W. Gazzam, William Hartshorn, and Calvin Washburn, who awarded that Ormsby should pay Bakewell seven thousand five hundred and eight dollars and sixty-three cents and costs of arbitration.

Bakewell recovered a judgment in the court of common pleas for this amount, on the award, which has been affirmed in the Supreme Court. Ormsby has paid forty-five hundred dollars on this judgment, with an understanding that it should not affect this suit, the object of which is to be relieved against this award and judgment.

The bill charges, among other things, that this contract was made with reference to the wheat crop of 1828; that the mill at the time was out of repair; that Bakewell agreed to lend to Page, agent of Ormsby, one thousand dollars on interest, to be applied to repairing the mill; that Page would not have made the agreement with Bakewell as he did, had he not understood that Bakewell would advance the loan of one thousand dollars; that Bakewell advanced one thousand dollars on April 24, 1828, which being considered the loan, was applied to repairs, as follows: Four hundred and forty-seven dollars and seventy-two cents, 30th June; eleven hundred and sixty-five dollars on the 31st day of July; thirty-seven hundred and forty dollars and sixty cents on 31st August; forty-three hundred dollars on 30th September; seventeen hundred and fifty dollars and seventeen cents on 31st October; one thousand dollars and thirty-five cents on 30th November; and fifteen dollars and eighty-eight cents on the 31st December, amounting to thirteen thousand four hundred and fourteen dollars and seventy-two cents; that large quantities of wheat were purchased by Page for Bakewell before the 8th September, at which time the weevil appearing in the wheat, 100] *Johnson, a dormant partner of Bakewell, refused to advance funds to Page, and directed him not to buy wheat, in consequence of which contracts for wheat were abandoned, and no purchases made until the latter part of September, when Bakewell advanced funds, and directed purchases to be made; wheat was not then to be had to keep the mill employed longer

than to January 1, 1829; when, by mutual consent, the contract was abandoned; that grinding for Bakewell commenced about the 1st of August; that the mill could manufacture about three hundred and fifty barrels per week, but it did not do so; that in August five hundred and six barrels of flour were delivered to Bakewell at the mill; in September three hundred and fifty; in October nine hundred and twenty-five; in November three hundred and seventy; in December and the following months seven hundred and twenty-three; that nine hundred and forty-nine barrels more should have been delivered, of which five hundred and thirty-seven should have been delivered in the first three months, and four hundred and twelve in the last two months; these nine hundred and twenty-nine barrels at three dollars and ten cents per barrel amount to twenty-nine hundred and twenty-one dollars and eighty-four cents, which, with the one thousand dollars borrowed of Bakewell, is the sum paid by Bakewell to Page, and not invested in wheat; but that if the nine hundred and forty-nine barrels were estimated by the average price of flour at the mill in August, September, October, November, and December, 1828, it would not be more than thirty-six hundred and ninety-one dollars, which, added to the one thousand dollars and interest, the complainant would have paid for peace; that Bakewell demanded fifty-five hundred dollars, which complainant refused to pay, and they then agreed to refer the controversy to the said arbitrators; that on April 6, 1829, the arbitators and parties met. Hartshorn, one of the arbitrators, produced a submission bond for signature, which was executed. The arbitrators then heard the statements and allegations of the parties, and adjourned to the 8th of ——. The complainants were notified that Hartshorn was sick, and that the arbitrators would not meet on that day; that the arbitrators, without giving complainant any notice of their meetings, afterward met on the 11th, secretly, and without hearing any testimony, even as to the value of flour, and made up their award; that the complainant remained in Cincinnati with his testimony as to the value of flour, and as to the loan of the one thousand dollars, and other matters, and wished to adduce it, but was prevented by not receiving notice of the meeting of the arbitrators; that Hartshorn ascertained the price of flour by conversation with the defendants and others not under oath, and reported it to the other arbitrators, on which re-

port they acted in fixing the amount of the award, taking the
101] highest *prices, and that they did not consider the one thousand dollars as loaned; that Hartshorn is somehow related to Johnson, and is under many obligations to him, which complainant did not know until after the award was made; that the award is unjust, and was produced by partiality in the arbitrators, or the fraudulent practices of the defendants.

Bakewell's answer denies that the award is unjust, or that it was produced by fraud, or that the arbitrators were either of them partial; it admits the meeting of the 6th of April, and that Hartshorn produced the submission bond for the parties, which was signed, and states that Page's account of the money received by Bakewell, and of flour delivered by him to Bakewell, was laid before the arbitrators, showing a balance of three thousand nine hundred and nine dollars and forty-four cents in favor of Bakewell, and was admitted by the parties to be correct, and that the only difference between the parties was, whether Ormsby should pay this sum with interest (which he offered to do), or the price of flour under the contract, as was claimed by Bakewell; that it was agreed by the parties that the average price of wheat was fifty cents per bushel; that the whole case was submitted to the arbitrators at their first meeting; that the arbitrators, if they wished testimony as to the evidence, were to call on Ormsby's miller; no other testimony was spoken of; that the loan of the one thousand dollars was not urged by Ormsby, but it was admitted that the three thousand nine hundred and nine dollars and forty-four cents had been paid on the wheat contract; that after the adjournment of the arbitrators at their first meeting, Bakewell received no notice from, nor had he any communication with the arbitrators, until after they had made their reward; that the arbitrators ascertained the value of flour by examining the books of flour dealers in Cincinnati. It is admitted by this answer that Bakewell knew that the mill wanted repairs, but denied that any money was loaned by Bakewell to Page for the purpose of making repairs, or for any other purpose. It states that Bakewell advanced money, when called on, to purchase wheat; that in September, 1828, he was absent fifteen days, and that while he was absent money was refused to be advanced, and purchases were not made for a short time; that he believes this was done at the instance of the miller, and for the benefit of the complainant; the

weevil was then greatly injuring wheat in the mill, and throughout the whole country; that at this time Page had one thousand five hundred dollars of Bakewell's money uninvested; that had the money *advanced been invested in wheat, after [102 crediting Ormsby with the flour delivered by him, there would have been in the mill about eight thousand five hundred bushels of wheat at the end of the year 1828; that the suspension of the purchase, the weevil in the wheat, and what related thereto, was submitted to the arbitrators; that on December 25, 1828, it was agreed that no more money should be advanced, and that the contract should remain as though that was the end of the year; that Bakewell does not know how much flour the mill would manufacture in a given time; that he would gladly have received it faster than he did; that the meetings of the arbitrators were not secret; that they did not adjourn to hear testimony; that there has been paid on the award, without prejudice, four thousand five hundred dollars; that in making the award the arbitrators charged him twice with seven hundred and fifty-six dollars and sixty cents, the price of manufacturing, and thus reduced the award so much too low, that after the award was made, he, for peace, offered to take five thousand five hundred dollars in full payment; that soon after the contract was made, Johnson, the defendant, became interested in it, and now has the whole interest.

Johnson's answer does not vary materially from that of Bakewell.

Page, the agent of Ormsby, testifies that when the contract was made with Bakewell, he did not know that Johnson was concerned in the business; had he known that he was, he would not have made the contract; that he made it believing that Bakewell would not take advantage of his inexperience; that when he made the contract the mill was out of repair; to repair it cost more than one thousand dollars; that he asked a loan of that sum of Bakewell to be laid out in repairs; that he thought Bakewell would let him have it, and a few days after the contract was made, he asked Bakewell for a part of the sum and was surprised that he refused it; that he did not mention the subject again until he mentioned it to Ormsby in the winter or spring after; that if Bakewell had told him he would not lend him the money, he would not have entered into the contract; that the repairs were not completed until July. In the latter part of July

grinding was commenced for Bakewell, and continued, with occasional interruptions, for the purpose of repairing the mill; that in July and August he purchased considerable quantities of wheat for Bakewell; that in September, Johnson, whom he knew as Bakewell's agent only, refused to advance money to purchase 103] wheat, *assigning as a reason, that the wheat on hand was injured by the weevil; he did not say that the money before advanced had not all yet been invested; that had he said so, an examination would probably have been made, and the money raised; that on the return of Bakewell, he immediately advanced funds to purchase wheat; that in September large quantities of wheat could have been purchased at a price within the contract; that the suspension of purchasing wheat injured the mill, for the farmers had understood that purchases would be made during the whole season at the mill. In November wheat was at fifty-six cents per bushel, and raised to a dollar, and that a quantity could have been had at this price if the contract had admitted of it; that it was the wish of Ormsby that the deponent and Templeton, the miller, should be examined before the arbitrators; that he was notified once or twice to attend their meetings, and once not to attend, as one of the arbitrators was sick. After the award was made, the deponent told the arbitrator, Gazzam, that he had no notice of the meeting of the arbitrators, and Gazzam expressed surprise that notice had not been given.

Templeton, the miller, testifies that in September, 1828, the weevil injured the wheat in the mill so much that six or seven bushels were necessary to make a barrel of superfine flour. He told this to Johnson, and advised the purchase of wheat to be suspended; that Bakewell was then away and Johnson directed the purchase to be suspended, and that during the suspension large quantities of wheat were offered for sale at the mill; that the mill could manufacture between forty and fifty barrels of superfine flour per day; that Ormsby requested him to be ready to testify before the arbitrators, but he was not called upon.

The depositions of the arbitrators were taken. They all agree that the only controversy between the parties before them was, whether Ormsby should pay to Bakewell the money he had received of him, with interest, and for which Bakewell had not received flour, or should account to Bakewell for flour under the contract. Washburn testifies that the admitted balance was thirty-

nine hundred and nine dollars forty-four cents; that the arbitrators had not time to determine the whole matter at their first meeting, and adjourned; that there was delay caused by the sickness of Hartshorn; that after the arbitrators had settled the principles on which they would award, he heard, in some way, that *Ormsby wished to have witnesses examined, and that [104 they were not examined because the matters that it was suggested they would prove could not affect the award. Hartshorn ascertained from the merchants and dealers the price of flour at the time it should have been delivered under the contract.

Hartshorn testifies that the arbitrators met three times; their first meeting was to hear, the second to fix the principles, and the third to make the award. He supposed, at the first meeting, they had got all the testimony either party wished introduced. The weevil was mentioned, and the suspension of the purchase of wheat, he thinks, mutually beneficial; that, before the award was made, something was said about other testimony, and that it was thought not to be material to either party; that in making up the award the arbitrators, estimating wheat at sixty-two cents per bushel, found Ormsby indebted twelve hundred and sixty-one barrels of flour; that this should have been delivered, at the rate of two hundred barrels every two weeks, from the time of making the last delivery, and charged this at the average market price, at three several periods, viz: six dollars forty-three cents per barrel; that he ascertained the prices from merchants, in Cincinnati, dealing in flour at the time; that the prices of the different merchants varied but a few cents, and they took the lowest.

Gazzam testifies that Ormsby relied, before the arbitrators, on the disastrous grain season, the refusal to advance money, and spoke also of the weevil; that no witnesses were heard by the arbitrators, nor does he know that the parties were expected to be again before them; that the arbitrators adjourned, to meet again, at the time Hartshorn was sick, and no meeting could then take place, of which fact deponent thinks he notified Ormsby, as Hill, his clerk, testifies. He thinks that the arbitrators considered themselves authorized to act after the first meeting; that no witnesses were examined before the arbitrators; that, either before or after the award was made, Ormsby said that he had important testimony; that had he supposed that there was testimony which would affect the interest of either party, he would have been for

hearing it; that he did not take a leading part in making the award, but that he examined the principles and the calculations, and does not remember any positive objection that he had to either; that he is a dealer in flour. It is proved by other witness, that in October, 1828, flour was selling in Cincinnati at three dollars eighty-seven cents and four dollars per barrel; in November at 105] upward of five dollars; in *December at five dollars fifty cents; in January, 1829, at five dollars eighty-seven cents and six dollars; in February and March at seven dollars; April, six dollars and upward.

ARGUMENT.

V. WORTHINGTON, for complainant:

The deposition of Mr. Bakewell is considered by us as inadmissible. The contract was made with him, the award rendered in his favor, and the claim of Johnson is, and must be made through him. It seems to us to be a most extraordinary position to assume, that a contracting party can divest himself of his interest, so as to make himself a competent witness to enforce his own contract, or to obtain damages for the breach of it. We concur generally, that one defendant may be a witness for his co-defendant, where he has no interest in the matter to which his testimony is applicable. 2 Johns. Ch. 550, 614; 6 Johns. Ch. 201; 1 Johns. 556, 557; 1 Atk. 451; 2 Ves. 223, 284; 3 Johns. Ch. 371-612; 3 Atk. 401; 1 Amb. 592; 3 Johns. Ch. 95; 2 Ves. 219, 629; 2 Ves. & Beam. 401; 10 Johns. 119; 15 Johns. 223; 2 Stark Ev. 766, n. 1, and 783, n. 1; 6 Peters, 57; 7 Cranch, 206. Yet we apprehend it can not be assumed that a contracting party can assign the contract, and then offer himself as a witness to sustain a contract that must be derived through him. It is true, Mr. Bakewell says he has no interest in the event of this suit, and let it go as it may, he will not be affected thereby; yet he forms a link in the chain, without which it could not be enforced. Take this very case, for a better one can not be presented for illustration. Bakewell procures a contract with Ormsby for the manufacture of flour; in the latter part of December, 1828, he terminates it, and insists on damages; procures an arbitration and an award, that is said by his adversary to have been obtained by undue means. In this situation, he was incompetent to sustain the award; so he knew and must have been advised. He has a secret partner, sells to him, and

then presents himself as a witness to sustain the award. Can it be tolerated? Upon principle it is wrong. It opens the door too wide for the fraudulent devices of the human heart, and presents too much temptation to human frailty to be sanctioned as a fixed principle in a system of wise jurisprudence. It is as near as can be, if it be not giving testimony in one's own case; it is sustaining one's own acts to the full amount transferred, and who can be so unbiased *as not to lean to sustain a claim to which he has [106 asserted a right, and which he has passed into the world as *bona fide* and true. It is upon this ground we think the testimony of this witness ought not to be received. 6 Peters, 51; 1 Term, 296; 8 Peters, 12.

The inquiry is, can the chancellor set aside the award made between Ormsby and Bakewell upon the case as now presented? The rule upon this subject, as we understand the law, is this: the chancellor will set aside an award for extrinsic causes, not apparent upon the face of the award, such as misbehavior, fraud, corruption, partiality, or mistake in the arbitrators. 1 Swift's Dig. 471; 1 Saund. 327, 328; 1 Atk. 64; 1 Day, 130, 153; 2 Wilson, 148; 8 East, 344; 3 Atk. 494, 644; 2 Day, 553; 1 Dall. 83; 2 Johns. 62; 3 Johns. 367; 9 Johns. 39; 1 Conn. 569; 17 Johns. 405; Kyd on Awards, 332, 347, 350; 2 Atk. 304; 3 P. Wms. 361; Ambl. 245; 6 Ves. jr. 70; 2 Ves. jr. 315; 5 Ves. jr. 846; 9 Ves. jr. 67; 1 Wash. 14, 158; 1 Johns. Ch. 101; 2 Johns. Ch. 339, 551. It is also equally true that if no time or place is designated in the submission, it is the duty of the arbitrators to appoint a time and place, and give a reasonable notice to the parties. 1 Swift's Dig. 489; 8 Peters, 178; Kyd on Awards, 95, 330; 3 Atk. 497, 530; 1 Saund. on Plead. and Ev. 227; 1 Conn. 498. Also, in the admission of testimony, the arbitrators should be governed by the same general rules as courts of law. Swift's Dig. 467. When arbitrators have promised to hear witnesses, but afterward make their award without hearing any, the award has been set aside for fraud and corruption. Kyd on Awards, 346; 2 Vern. 251. So when they received testimony, where they had notified the parties they would hear no more. 6 Ves. jr. 60. So when they promised to make their award not till after a certain event, but made it before. Kyd on Awards, 346, 347. So when they excluded the parties, and examined the witnesses separately. 1 Dall. 83. So when the necessary time to produce witnesses was refused. 4 Dall. 272. And it

is said that, without collusion or gross misbehavior, a material mistake in point of fact, an erroneous statement of an account, even a plain mistake of law coupled with other circumstance, are grounds for an examination of the proceedings of arbitrators in 107] *a court of equity; from the result of which, the award may be partially affected in a greater or less degree, and sometimes totally set aside. Kyd on Awards, 350; 2 Vern. 750; 3 Atk. 494, 644.

N. WRIGHT, for defendants:

Every presumption of law and fact is in favor of the award. The party who would set it aside takes the burden of proof; and more especially because he has resorted to a tribunal of his own creating, to men with whom he has once declared himself satisfied; also, because, in all amicable adjustments, many things are always conceded by a tacit assent; forms are not relied upon; parties put their cases on the grounds which they consider just; they pass over many technical objections which lawyers might take, in their own views of right and wrong; they know, between themselves, what they have considered their mutual rights, how they have acted, and what grounds of reliance they have given to each other; and in submitting cases in their own way, before a spirit of litigation has arisen between them, they are much more likely to submit a case according to real simple equity and justice.

If a party was required in any particular, to sustain an award *prima facie* by affirmative proof, the consequence would be, that in all those cases of mutual confidence and understandings, no award could be sustained; because, especially after a lapse of time, no proof could be given of such tacit understandings.

In all cases, the party who alleges misconduct or fraud must prove it, and that unequivocally; for the acts of persons are to be reconciled with honesty of purpose, if possible.

The party who alleges wrong, injustice, or unfairness, in the decisions of an arbitrator, must not only prove it, but must also prove that the same matter, which he now complains of, was submitted to the arbitrators, and unfairly decided on, by them; that is, he must show that he took before the arbitrators the objection which he now takes, and on that objection there was an unfair decision. It is entirely irrelevant for the complainant now to show a state of fact, on which the decision of the arbi-

trators would be wrong, unless he show that he also presented a like state of fact to the arbitrators. For he can not come here for relief, because he neglected *to present his case fully before [108 the arbitrators; or because he then thought the justice of the case required only one particular view of it, though he is now so excited with the spirit of litigation, that he can see justice in the grounds of resistance—his relief must depend on the *fraud* or *misconduct* of the arbitrators; not upon his own neglect or even want of skill in managing his case. Even in case of a trial by jury no new trial is granted, because the party put his defense upon one ground, when he might have taken some other, which, possibly, might have given him a better chance.

Awards are set aside in chancery, "only for corruption, partiality, or gross misbehavior in the arbitrators, or some palpable mistake of the law or fact." Herrick *v.* Blair, 1 Johns. Ch. 102.

They will not be set aside, because new evidence is discovered or that a more perfect rule of justice might have been adopted, but only for mistakes on their own principles, or fraud or misbehavior in the parties. Atlee *v.* Ramsey, 1 Conn. 571.

Not for mistake or error in judgment. There must be corruption or gross mistake.

Nor for under or over valuation, if there is no fraud or misconduct. 1 Mad. Ch. 30; Knox *v.* Symonds, 1 Ves. jr. 369; Underhill *v.* Vancordtlant, 2 Johns. Ch. 361; 17 Johns. 416.

It is said in several cases, that *mistake* of the arbitrators may be made a ground of setting aside an award. The meaning of this is explained in 1 Conn. 571, (above). If the arbitrators make a mistake on their own principles, that is, by a miscalculation, or the like, produce a result different from what they intend, there may be relief, and it is most usually granted (where it can be), not by setting aside the award, but by rectifying it according to its intention. As to any other mistake, such as a mistake in judgment, or rather an error in judgment, it is no ground of setting aside the award. If the arbitrators themselves will come forward and say, that they have made a mistake, and produced a result different from what they intended, it is a different matter. But errors in judgment and wrong conclusions of fact from the proof, are no grounds of objection, except as evidence of fraud or corruption.

One point a good deal canvassed in the books is, whether an

award can be set aside because arbitrators have erred in the law. 109] All the cases, old and new, agree thus far, that if matters of law are *expressly referred* to the arbitrators, it is no objection to the award that those matters are wrongly decided; and if they are *not expressly referred*, but those matters are complex and doubtful, or blended with fact, the result is the same. Ching *v.* Ching 1 Madd. Ch. 79; 6 Ves. 282; 1 Johns. Ch. 226: Jackson *v.* Amble, 14 Johns. 103.

But there are *dicta*, which seem to indicate that an award might be set aside, *merely* because the decision was against law. This, I think, not to be sound law.

A reference of a case to arbitrators, without any restrictions or reservations, submits the *law* to their decision just as positively as the *facts*. No case can be decided without deciding some principle of law as well as fact; and when two men agree that a third shall decide it, what is the meaning of this agreement if it does not cover the whole case? There is no superior tribunal to decide the law for them, and the agreement is a perfect nullity if it does not cover the whole case. It seems to me the merest nonsense that ever was uttered to say that an unqualified agreement to refer a case does not include a reference of the law. Will it, then, be contended that a man is not competent to agree to abide by a wrong decision of the law? It might as well be contended that he is not competent to give away an article of property that belongs to him. If the cases are properly examined I think it will be found that this, as a general principle, is not sustained by authority. It is too absurd on the face of it. A gross error in deciding the law has been used as an evidence of corruption; where the arbitrators have *intended* to follow the law, and by mistaking it have produced a result different from what they intended, so that they would themselves certify that the result was not what they designed; where the terms of the submission contained some restriction in this respect, in these, and perhaps other cases, a wrong decision of law has been made the turning point in setting aside an award.

So in ordinary *references* of proceedings pending at law or in chancery, an error in law is a ground of setting aside a report; but these are a totally different class of cases.

Judge Story, in Kline *v.* Catara, 2 Gall. 61, obviously lays down the correct principle in such cases, viz: That a general sub-

mission refers both the *law* and the *fact* to the arbitrators, and their decision thereon is conclusive. If the *intention is to [110 restrict the arbitrators in this particular, it must be so expressed in the terms of the submission.

It is said that Bakewell's deposition is inadmissible. It is of very little importance whether it is read or not; but I take it that it comes within the rule. He has parted with all his interest without recourse, and having no interest in the event of the suit, it is no objection in chancery that he is a party, although he may, perhaps, be made liable for costs. 2 Johns. Ch. 350, 614; 3 Johns. Ch. 201, and other cases cited by complainant.

HAMMOND, in reply:

By the terms of the contract no specific time of delivering the flour was fixed. It was to "remain in the mill, if so required."

The wheat purchased was to be purchased for Bakewell. When so purchased it remained in the mill at his peril. This, I think, is the fair interpretation of the contract.

Two events not contemplated by the parties occurred:

Weevil in the wheat in September,

And a great rise of price in November, continuing until the contract would expire.

In consequence of the first, and not apprehending the other, the money advanced was not invested in wheat as advanced, and in December it became a ruinous contract to Ormsby, if he should proceed to make purchases. It was then agreed to settle and adjust the contract as if it had run its entire term. What, then, was Bakewell's claim against Ormsby? The decision of this question settles the whole case. Can there be any doubt what that claim was? It was, then, to demand his flour, or the price of it.

The wheat was to be purchased and manufactured progressively; the flour was to be progressively delivered. Such is the import of the contract—so the parties interpreted it. Money was advanced from month to month; flour was delivered in parcels from time to time. Bakewell had a right to have his flour that he might take advantage of the market. He could fix its price upon Ormsby by requiring the flour to be then delivered. If he did not make this requisition, and the price of flour fell, it was his loss; if it raised it was his gain. On the 25th of December this was Bakewell's right Ormsby could not say, in answer to his demand, I *will de- [111

liver your flour on the 1st of April. Had flour fallen on the 20th of January to three dollars and ten cents, Bakewell never would have consented to the rule for fixing the price assumed by the arbitrators. It would have been obviously most iniquitous as to him. In a change of circumstances it can not be just as to Ormsby.

Both parties agree that a new arrangement of the contract was made on the 25th of December. Bakewell states that "*it was to remain and be settled up as of that date, in the same manner as if that had been the end of the year.*" What would have been Bakewell's rights at that period? Very clearly, for all flour not delivered on the 22d of April, its market price on that day. Can anybody believe, that with the clear profit of his contract in his hands, on the 25th of December, he intended to give it up, for what might be its value on the 22d of April following? It is but to state the proposition to demonstrate its unreasonableness.

If the contract was put an end to, on the 25th of December, it fixed the rights of the parties as of that day. If it remained in force, it left the parties to stand upon their rights under it. Suppose it to remain in force, and that no demand of the flour was made 25th of December. What were Bakewell's rights? Nothing more than to receive the flour when demanded, or its price at the time of demand. No demand was ever made, with a view to fix the price, or to receive the flour. The arbitration was commenced before the contract ended. By what rule would the damages be ascertained, supposing the contract in force? To convert the flour into money in Ormsby's hands demand must be made, and this is not pretended. There is yet, then, no cause of action. None of the parties or arbitrators acted upon this principle. And this shows that all considered the contract at an end December 25. The consequence has been already stated.

The award assumed that the balance of money unaccounted for, December 25, should be reduced into flour at three dollars and ten cents per barrel, and thus made due at that day one thousand two hundred and sixty-one barrels of flour. It then assumed that two hundred barrels of this flour should be delivered every two weeks; thus running the delivery through the months of January, February, and March, and into April; and then charges Ormsby with an average price. Now it is most clear that this could not be correct if the contract remained in force, because the rights of the
112] parties *must be fixed by their own acts, and Bakewell did

nothing to fix his rights, upon the basis assumed in the award. It is equally clear that if the contract was given up, the rights of the parties were fixed by that fact, and could not be affected by subsequent events. The assumptions upon which the award was based shows that the parties and the arbitrators proceeded on the hypothesis that nothing was to be done by either party after December 25. This fact established, and the controversy is settled. Bakewell's rights were then fixed, and his claim to compensation must be settled accordingly.

Judge COLLETT delivered the opinion of the court:

The objection to the deposition of the defendant, Bakewell, we think, is well taken. It is true that Bakewell states, in his deposition, that he is not interested; but he transacted almost the whole business. Johnson was known in the transaction, to Page, as Bakewell's agent only. Bakewell made the contract, advanced the money, received the flour, submitted the controversy to the arbitrators, and managed it before them in his own name. The award was, that the money be paid to him. Johnson was not interested when the contract was made. Bakewell is not a mere formal party, he is not a mere trustee; but he is charged with fraud in every important transaction leading to the result that the bill prays against. Against him, relief is prayed; and he might, in this suit, be subjected to the costs of this suit, the suit at law, and of the arbitration. To prevent plaintiffs at law from fraudulently making the defendant's witnesses parties to the suit, when no evidence on the trial is given against a defendant, a verdict may be taken for him, and he may then be sworn as a witness for his co-defendant; for the same reason a defendant in chancery, improperly so made, may be examined for his co-defendant, and so may one who is a mere trustee or formal defendant. 2 Stark Ev. 766; 2 Madd. Ch. 145. But when he is the all-important defendant, charged with actual fraud and misconduct throughout the whole transaction, and, if he is not interested, has reaped the whole fruits of his misconduct, and may still be liable for more than the costs of the suit, he can not testify for his co-defendant. 3 Johns. Ch. 612.

The view which we take of this case renders it necessary to decide whether a party can have relief against an award, after a judgment has been obtained against him thereon at law. *Per- [113
sons have a right to settle their own controversies on any terms

they please; and it is their duty to settle them, if they can do so, without too great a sacrifice. They have a right to refer their controversies to arbitration, on such terms as they can agree upon. By a reference such as is made in this case, the arbitrators are authorized by the parties finally to settle their controversy; and they are necessarily authorized to determine on all the incidental questions, whether of law or fact, that may arise in the investigation of the case. They are constituted by the parties, chancellors, judges, and jurors for the determination of the controversy. Whenever a court is given jurisdiction of a cause, with it is impliedly given the right to do all things, and to decide all questions, necessary to the right and just determination of that cause.

Arbitrators are generally chosen because of their character for integrity and practical knowledge of the business out of which the controversy arises. They accept the appointment, not for gain, but to reconcile their contending acquaintances with each other; to prevent a protracted, vexatious, and expensive litigation. The proceedings of such judges, so constituted by the parties accepting the appointment, as they generally do, from motives of kindness, useful as they are, by speedily, cheaply, and, in general, rightly determining the controversy, ought to be favorably viewed by the courts, and should not be disturbed, unless it is made clearly to appear that they have not regarded the principles of natural justice in hearing the parties, or giving them an opportunity of being heard; or that they were partial, or corrupt, or were imposed on by fraud; or that they have made a plain mistake in carrying out the principles they had settled. 2 Johns. Ch. 361–367; 17 Johns. 416; 2 Pet. Cond. 461–466; Davy's Ex'r v. Fowe, and note, Kyd, 330, 331; 1 Dallas, 161, 162; 2 Bibb, 456–459.

At the first meeting of the arbitrators, the parties appeared before them. The account kept by Page, Ormsby's agent, of money received of and flour delivered to Bakewell, was produced and admitted; from which it appeared that Bakewell advanced to Page three thousand nine hundred and nine dollars and forty-four cents more than he had received flour for. This sum, with interest, Ormsby wished to return to Bakewell. Bakewell was not willing to receive it, and insisted on having the value of the flour which had been produced, had this sum been vested in wheat, and 114] the wheat manufactured *according to the contract. This was the only difference between them. They produced no wit-

nesses; each urged his pretensions on the arbitrators. Ormsby relied upon the wheat crop being injured by the weevil, and the refusal of Johnson to advance money; Bakewell relied on the contract. After the parties had been heard, the arbitrators adjourned over to another evening, to agree upon the principles on which they would award. They believed they had got the whole case. Bakewell so understood it. He never afterward had any notice of the meetings of the arbitrators, nor was he before them. So he states in his answer. One of the arbitrators gave Ormsby notice that they would not meet at the time appointed for their second meeting. He received no notice of any subsequent meeting.

After the parties have been heard fully, and the arbitrators have the case, it is no objection to the proceedings of the arbitrators that the parties have not notice, or do not attend their meetings, for the purpose of consulting with each other. The presence of the parties, at the consultation, would not usually be desirable or expedient. Where there is but one arbitrator, after he has heard the parties and got the case, if he has doubts, or calculations to make, he will take time, make up his opinion, either at home or abroad, and make his calculations and his award, whenever it best suits his own convenience; but where there are several arbitrators, they would come together to converse, consult, and calculate.

In the present case, after the arbitrators had settled the principles on which they would award, some of them heard that Ormsby wished his witnesses examined. They did not hear them, because they thought it would not vary their award. They must have known what he wished to prove, from having heard his statements and remarks when the case was submitted. The weevil in the wheat, the suspension of purchase, while the wheat was receiving injury in the mill, they had taken as facts, and had come to the conclusion set forth in the award. Hartshorn says, that he thought the suspension mutually beneficial. When Ormsby submitted his case to the arbitrators on the mutual statements of the parties, it does not appear that there was the least disagreement as to facts. He gave them the right to decide without further hearing. When he afterward changed his mind, he should have gone to the arbitrators, and insisted on having his *wit- [115
nesses heard. Had they then refused, the testimony being relevant, I know not but that their reward would be relieved against.

But here is no offer and rejection. He changed his mind, but never came to the arbitrators and told them so. He had the benefit of the testimony, for the arbitrators took his statements as facts. If it had been intended that the parties should again be before the arbitrators, why was not Bakewell notified? Arbitrators, as well as other judges, should be circumspect, and do or say nothing that would lead to a suspicion of their honesty or impartiality. It would have been better, in the present case, had Hartshorn not drawn the submission bond, and had the arbitrators hunted up Ormsby, notified Bakewell, and heard Ormsby's witnesses. It would have been more satisfactory to him. But we see nothing in these things which would justify us in setting aside this award. As to the value of the flour, the case went to the arbitrators without any evidence or agreement as to this; flour was high, and fluctuating in price from day to day; at what price it should be fixed depended on the time or times the arbitrators determined it should have been delivered. The arbitrators were all dealers in flour in Cincinnati, and this was probably the reason that this part of the case was left in the situation it was. What could they do, but fix it from their own knowledge, and, if they thought proper, by an examination of the books of dealers in flour at the time? It is often the case that, from the want of evidence as to value, juries have to determine it from their own knowledge. Arbitrators and judges state their cases to friends in whose judgment and integrity they have confidence, that they may aid them in coming to a more satisfactory conclusion. 2 Johns. 353; Kyd, 95; 1 Dall. 161, 162.

This is a very hard case on Ormsby. The award is much higher than the sum Bakewell agreed to take. The arbitrators may have erred in determining that Ormsby should pay the value of flour, and not return the money advanced, with interest; they may have erred in fixing the times at which the flour should have been delivered, and in the value of flour at those times; but these were the matters submitted to them for determination. We see a want of circumspection, but not a want of integrity, or a departure from those rules which natural justice required should be observed in hearing and determining the case. 2 Johns. Ch. 358, 361–363; Kyd, 330.

The bill must therefore be dismissed.

*William W. Simmons *v.* The State. [116

In a prosecution for forgery, the person whose name is charged to be forged is a competent witness to prove that fact. It is not necessary for the prosecution to call the alleged subscribing witness.

Reserved in the county of Richland.

The plaintiff was indicated for forgery. The forged instrument is set out, in the indictment, in *hæc verba:*

"One year after date, I promise to pay William W. Simmons, or bearer, one hundred dollars, for value received, with interest from date. September 13, 1833. One hundred dollars.

"Attest: *Abijah Simmons.* Otho Simmons."

The plaintiff being arraigned on said indictment, plead not guilty, and was tried, convicted, and sentenced to imprisonment in the penitentiary.

The counsel for the plaintiff have assigned for error: 1. That the court of common pleas erred in permitting the said Otho Simmons to swear that he did not sign the note, without *first* calling the subscribing witness, or accounting for his absence. 2. That said court erred in permitting the said Otho Simmons to testify, as a witness, on said trial. 3. That said court erred in not calling on the subscribing witness to said note, to prove whether the signature thereto, purporting to be his, was spurious or genuine.

Coffinbery and May, for plaintiff.

McLaughlin, prosecuting attorney, for the state.

Opinion of the court, by Judge Wood:

The bill of exceptions shows that the facts assumed in the several assignments of error occurred on the trial, although the evidence was objected to by the plaintiff's counsel. The court of common pleas are supposed to have erred, and we are called upon to reverse their proceedings.

The first inquiry, in the order in which the several questions are presented in the record, is, whether the person whose name is forged is a competent witness to prove the forgery, without the subscribing witness is *first* called, or his absence accounted for?

The reason of the rule requiring the execution of deeds and other instruments to be proved by the subscribing witnesses, as given in the books, is, that they are presumed to be better acquainted with the circumstances that transpired at the time; 117] *and not only so, but, by selecting them as witnesses to their transactions, the parties mutually agree to resort to them for the proof, and, unless these channels are closed by events not within the control of the parties, through them the evidence must be adduced. This rule was departed from in Hall *v.* Phelps, 2 Johns. 451, which was a case on a note; but it is *now* well settled, whatever may be the instrument. Hagland *v.* Sebring, 2 South. 103; Henry *v.* Bishop, 2 Wend. 575; Zerby *v.* Wilson, Pet. Cond. 462.

But to what class of cases is this principle to be applied? Certainly not to the one now before us. In a case arising between the parties to such an instrument, having a subscribing witness, and where the obligor, being interested, is excluded from testifying, the rule is a good one, which requires such witness to prove its execution. The person whose name is forged, can not be supposed to have selected a subscribing witness to prove that *he* executed an instrument, and the circumstances attending the execution; because the very fact of forgery proves that he had no knowledge of the making of it. When the obligor is competent, he must be the best witness of which the case will admit; and the subscribing witness need not, in such case, be called, for *ratione cessante, cessat ipsa lex.*

2. Was the supposed maker of this note a competent witness, on the trial, to prove the forgery?

In England, formerly, on a conviction for forgery, the forged instrument was condemned, and ordered to be destroyed; hence a party who would, if the instrument had been genuine, have had an interest in its destruction, either because he would have been liable on it, or because it would have barred his claim against another, was regarded as a competent witness, since the proof against him, at all events, was rendered much more difficult by a conviction. 2 Stan. Ev. 581. The objection to competency, has survived the practice on which it was founded; and the rejection of witnesses on this ground has been considered an anomaly, for it is certainly irreconcilable with the general principles now established on the subject of interest. Id. 581. In note 1, it is said, on

the same page, that the English rule that excludes a party whose signature is alleged to be forged, from testifying in support of an indictment for the forgery, is adhered to in Connecticut, Vermont, and North Carolina; but in New Hampshire, Massachusetts, and Pennsylvania, he is held to be *competent, as in other analo- [113 gous cases. In New York, in 1794, the English rule was adopted; but, in The People *v.* Howell, 4 Johns. 296, Chief Justice Kent says: "Since that time, the question of interest in a witness has been examined and defined with more precision, both in England and New York, and the exclusion of the party in the case of forgery has become an anomaly in the law of evidence; and it would seem to be fit and proper that the rule should no longer be applied."

Different decisions have been made, it is said, in different circuits in this state; and to produce a uniformity of decision on a question so important to the administration of criminal justice, consistent with the general analogies of the law, it is necessary the case should be determined in this court.

The rule which rejects the supposed obligor as incompetent to testify, is condemned by both Starkie and Phillips. However it may be elsewhere, in this state the supposed maker has no interest in the event of the prosecution for the forgery of the instrument. The instrument is, in no event, destroyed. If sued on such note, the person whose name is forged could not avail himself of a conviction, produced in whole or in part by his own testimony, to avoid its payment. The conviction would be no bar to such suit. 2 Stan. Ev. 184.

We are, therefore, of the opinion that the person whose name is forged is a *competent* witness to prove the forgery.

3. Was it error in the court of common pleas, that it did not direct the subscribing witness to be called, to testify whether the note was genuine or a forgery?

This point is easily disposed of. It is no cause for error, that the court did not direct other testimony to be called. It was optional with the state to improve *all* or only a *part* of its witnesses, at its pleasure; and if the plaintiff in error were desirous of availing himself of the evidence of the subscribing witness, and if there were such a person *in esse*, the law had provided the means by which such testimony could be obtained.

The judgment of the common pleas is affirmed, with costs.

119] *THOMAS MURDOCK AND OTHERS v. RATCLIFF, CATHCART, AND TIFFANY.

A lease of lands for ninety-nine years, renewable forever, is a chattel that, upon the owner's decease, passes to his executor or administrator as any other chattel interest.

THIS is a suit in chancery, reserved from the county of Butler.

The case shows that Andrew Murdock, deceased, devised to his wife, Mary Murdock, after his debts and one legacy were paid, "all the residue of his estate, real and personal, to hold during the period of her natural life." He died possessed of personal property, and of a leasehold interest of ninety-nine years, renewable forever, in a lot of land owned by the Miami University, leaving his wife and Ratcliff his executors. Mary Murdock, the widow and executrix, possessed the property after the death of her husband, and intermarried with Cathcart, who died. Cathcart has conveyed the leasehold interest to Tiffany. The plaintiffs being the brothers and sisters of Andrew Murdock, and his next of kin, seek by this bill an account from Ratcliff of his settlement of the personal estate; and averring their title to, and possession of the leased lot, to which they say Cathcart and Tiffany pretend some right, they ask the court, under our statute, to quiet them in their possession against these claims.

The answers of Cathcart and Tiffany admit the facts stated in the bill, and rely on the title to the land made by a conveyance from Cathcart to Tiffany.

The defendant, Ratcliff, shows a due administration of all the estate of the decedent and a settlement with the court. He denies ever intermeddling with the leasehold property.

WOODS, for plaintiff:

The cause is submitted to the court upon the bill and answers. The complainants contend that Mary Murdock had by the will but a life estate in the personal property and land, and that after her decease the complainants, as heirs at law of said Andrew Murdock, are entitled to the estate, real and personal.

It is presumed it will be admitted that the devise in this case would pass nothing but a life estate, if the land in question is an

estate of inheritance. The complainants contend that the land held under the Miami University is inheritable, and passes to the heirs as an estate of inheritance. *Section 10 of the act to [120 establish the Miami University, 7 Ohio L. 184, provides that "the tenants or lessees shall enjoy and exercise all the rights and privileges which they would be entitled to enjoy and exercise did they hold the lands in fee simple, any law to the contrary notwithstanding." Since the passage of this act, the lands held under the university have been considered as estates of inheritance; they are never sold or transferred by administrators; partition is made of them as of other real estate among the heirs of the deceased owner.

If it be personal property, or only a chattel real, the law is settled that a life estate may be granted to one person and a devise over made to another; or if no devise be made of the residue of the interest, it will go to the representatives of the personal estate or to the heirs at law.

This point was expressly decided by his honor, Judge Collett, in the case of William Leigh et al. *v.* William Smith, in Butler common pleas, in a case which was warmly contested. The deceased, in that case, held lots in New York for a term of years, on ground rent, on which he had erected buildings. He devised all his money, bonds, property, and effects to his widow during her natural life. The widow sold the leases and collected the bonds, and with the money purchased land in the name of William Smith, her second husband.

Judge Collett held the land in the hands of Smith after her decease liable to the heirs for the money, with interest, from her decease. This case is referred to, not as a binding authority, but to show what the decision has been on a similar question. See 1 Roberts on Wills, 431; 3 Merivale, 194; 5 Johns. Ch. 21, 342.

It is too well settled to be now questioned that the intention of the testator must prevail. See 4 Kent, 519-522. Can it be doubted, in this case, that the testator intended to only give a life estate? He expressly devises "to his wife, Mary Murdock, the residue of his estate, both real and personal (after the payment of debts and the legacy to Lucinda Lee), to have and to hold the same during the term of her natural life." What can be more plain and direct than the expression by those words to give a life estate only? The testator treated the farm in controversy as real

property, and he expressly gives it, with his personal property, to his wife during her life. If he had intended to give her a greater
121] *interest than a life estate, the latter clause of the sentence is not only unnecessary, but is utterly inconsistent with such an intention. Unless there is some binding authority or principle which is imperative upon the court, it will not, it is confidently believed, set aside the will of the testator and wholly disregard the intention which he has clearly expressed.

VANCE, for defendants:

It is contended by the defendants, first, that the leasehold interest, held by Andrew Murdock at the time of his death, and which is described in the bill of the complainants, is not an estate of inheritance. The heirs can not take by descent; such estates must go to the executors as personal chattels. See 6 Durnford & East, 289–292, where such an estate is devised to A. and the heirs of his body with remainders over; A. may dispose of the whole and defeat the remainders by any conveyance during his lifetime; or he may do the same by his will alone. See the same case above noted. Mary Murdock, therefore, had the power, at any time during her widowhood, to dispose of, for her own proper use, the estate in question, and after her intermarriage with James Cathcart, one of the defendants, the same power vested in him as husband. In the chattels real of the wife, present and vested, an interest of the nature of the joint tenancy of the husband and wife is created by the marriage, and is a consequence of their legal unity, but subject to alienation by the husband in his lifetime. See Toller on Executors, 212; Plowd. 418; 2 Black. Com. 435. In case the wife die before the husband, all the chattels real of the wife, in which there exists a present actual and vested interest, become absolutely and entirely his own by survivorship. And that, too, without taking out letters of administration to her. Toller on Executors, 216; Coke upon Littleton, 300; Com. Dig., Baron and Feme, E. 2; Roll. Abr. 345.

In the present case the executors of Andrew Murdock were chargeable with the payment of the debts and legacy of Lucinda Lee, which was to come out of the estate, after which the residue was given and devised to Mary Murdock, she being appointed executrix, and herein would be entitled to the absolute interest in

the estate so devised. 4 Durn. & E. 89. Without this, however, I presume it would not be denied but that Mary Murdock was entitled, under the *will of her husband, to the absolute in- [122 terest in the personal effects of the deceased, after the payment of the debts and legacy aforesaid. A leasehold interest has been uniformly decided to be personal property, although it may contain a stipulation that it shall be renewable forever, 5 Ohio, 207; and it would be going too far to say that "a life estate may be granted to one person, and a devise over made to another; or if no devise be made of the residue of the interest, it will go to the representatives of the personal estate, or to the heirs at law.' Where the use or usufruct only is devised, the power of the devisee, over the property devised, may be thereby restrained; but to disregard the distinction between a devise of the usufruct and a devise of the chattel itself, would seem, to my mind, preposterous. Be this as it may, however, the authorities referred to by the counsel for the complainants, in 5 Johnson, only serve to confirm me more strongly in the opinion that this action can not be sustained as against the present defendants; that should the complainants have a remedy at all, they should seek that remedy in a different way.

It is presumed that it will not be denied that in limiting a devise as to estates clearly of inheritance, much slighter circumstances or less expressive language would be regarded as sufficient than would be required in those cases where the law is less favorable to a devise over, or to a descent of the residue of interest. The complainants, in order to show that the estate in question is inheritable, and passes to the heirs of an estate of inheritance, have cited section 10 of the act to establish the Miami University. 7 Ohio L. 184. Certainly it was never intended by the legislature, in using the language therein expressed, to alter the long-established law and usages upon that subject, by enlarging the quantity of interest, or changing the rule by which that interest should be acquired, held, or disposed of. It would be more reasonable to suppose that the language of the law referred to was intended rather to guard the civil rights of the occupant, by affording to him all the privileges as a citizen which the possessor of a freehold estate could enjoy. In this light can the case only be regarded.

Judge LANE pronounced the opinion of the court:

The plaintiffs, claiming to be the heirs of Andrew Murdock, 123] *inheriting his realty*, pretend to be entitled, in that character, to an account and distribution of the personal estate; and while they ask the account against one defendant, they pray to be quieted in their possession against the others. The bill is objectionable for its multifariousness, as it attempts to combine in the same suit claims against different classes of defendants, between whom subsists no privity.

But, passing over this objection, their rights to the personal property have no existence upon this state of facts. The plaintiffs are the brothers and sisters of the decedent, and in the absence of legitimate issue, inherit his real estate; but as he died without children, the law (Stat. of Ohio, ch. 29, p. 236, sec. 28) gives the whole of the personalty to the wife. Whatever, then, be the deficiencies of the administrator, the plaintiffs have no interest in calling him to an account.

Their right to the college lot depends on the character of the estate which Andrew Murdock held in it; if it be not inheritable, their possession ought not to be protected. It was a lease upon an annual rent for ninety-nine years, renewable forever. We know that such interests are usually treated as fees simple by the holders; that in case of death, they are ordinarily transmitted to the heirs as realty, without being accounted for by the administrator; that the law requires them to be appraised as real estate in sales under execution (Stat., ch. 29, p. 103, sec. 19); that such interests are liable to dower (29 Stat. 250, sec. 1), and, perhaps, it might be expedient for the legislature to make them inheritable; but no proposition has been better settled, from the earliest days of the common law, than that a lease, of whatever duration, is but a chattel. In the absence of legislation, it only remains for us to follow the current of authorities. 3 Ohio, 465; 4 Ib. 207.

The only statute we find upon this subject is contained in the "act to establish the Ohio University." 6 Stat. of Ohio, 188, sec. 10. Which declares that the tenants or lessees shall enjoy and exercise all the rights and privileges which "they would be entitled to enjoy, did they hold their lands in fee simple;" a provision designed, in our opinion, to secure to the tenants civil and political privileges; not to change the quality of their estates.

Counsel have argued this case upon another hypothesis; taking

the lease to be a chattel, as the testator gave it to his *wife [124 for her life only; what remains after her life is not disposed of by will, but reverts to the testator, to be distributed by his representatives. This doctrine, when applied to chattels real, seems countenanced by the books. 6 Cruise, 287; 1 P. Wms. 666; 1 Salk. 278. But our view of the case renders a decision unnecessary; if the estate of the widow was for life only, and a reversion substituted in the executors of the testator, subject to distribution, she was the executor and the distributee, and entitled to such reversion, and her rights became absolute, since the estate for life and the reversion met in the same person.

Bill dismissed.

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LESSEE OF MICKEY *v.* HENRY WINTRODE.

THIS was an action of ejectment, brought in Richland county, and reserved for decision in bank, upon the following facts:

In 1814, Daniel Mickey received from the register of the Virginia military school district a lease for the southwest quarter section three, range twenty-two, for ninety-nine years, renewable forever. In 1828, he died in possession, leaving his widow, Elizabeth, and ten children, of whom the lessor of the plaintiff is one. The administrator of Daniel Mickey caused the lease to be inventoried and appraised as personal property, and set it out to the widow as a part of her share in the personal estate. Her interest is now held by the defendant. The plaintiff brings this suit, claiming the lease to be an estate of inheritance, coming to him by descent.

Judge LANE pronounced the opinion of the court:

We have investigated the governing principle of this case during the present term, in the case of Murdock et al. *v.* Ratcliff et al., and in holding leases of this nature to be personal property, and not inheritable, we deny the right of the plaintiff.

Judgment for defendant.

125] *STATE OF OHIO *v.* COMMERCIAL BANK OF CINCINNATI.

The charter of the Commercial Bank of Cincinnati is so framed that no tax amounting to more than four per cent. upon the dividends, can be levied upon the bank or its business.

RESERVED in the county of Hamilton.

This is an action of debt, brought by the State of Ohio against the defendants to recover the amount of tax due upon dividends, declared on July 1, 1833, and January 1, 1834.

The case was submitted to the court, on an agreed statement of facts, substantially as follows, to wit:

The defendants declared a dividend of twenty-five thousand dollars, on July 1, 1833, which was duly certified to the auditor of state, who thereupon drew upon the defendants for five per cent. on said dividend, amounting to twelve hundred and fifty dollars. The defendants paid upon this draft one thousand dollars, being four per cent. on the dividend, and refused to pay the balance, amounting to two hundred and fifty dollars.

On January 1, 1834, another dividend was declared of twenty-two thousand six hundred and thirty dollars, which was also certified to the auditor of state, who thereupon drew for eleven hundred and thirty-one dollars eighty cents, being five per cent. on the last-named dividend. This draft was presented to the defendants for payment on March 17, 1834, who refused to pay the whole amount, but offered to pay at the rate of four per cent. on said dividend, or four-fifths of the last-named sum, which was refused.

Should the court be of opinion that the Commercial Bank is liable to pay five per cent. tax on its dividends, then judgment is to be entered in favor of the plaintiff for the sum to be computed as follows, to wit: two hundred and fifty dollars, with interest, from November 12, 1833; together with eleven hundred and thirty-one dollars eighty cents, with interest from March 17, 1834, and costs of suit.

Should the court be of opinion that the bank is liable to pay only four per cent., then judgment is to be entered in favor of the plaintiff for the sum of nine hundred and five dollars and forty-four cents, with interest thereon from the rendition of the judgment, without costs.

VAN MATRE, for plaintiff.

*N. WRIGHT, for defendant, cited 4 Wheat. 518; 2 Kent [126 Com. 244; Ang. on Cost, 503; 4 Ohio, 432; Ang. on Cost, 265.

Judge HITCHCOCK delivered the opinion of the court:

On March 12, 1831, the legislature of the state, by an act entitled "an act to tax bank, insurance, and bridge companies," 29 Ohio Stat. 802, levied a tax of five per cent. on the dividends of all such companies, and prescribed the mode in which the tax should be collected. The course pursued in this case is in conformity with that law; and the Commercial Bank of Cincinnati is within the provisions of the act as much as any other bank in the state, unless there is some principle of law which will operate to except it. To this law we see no objection; for although it has been doubted by many, whether the legislature have the power to tax private corporations, unless the power is reserved in the act of incorporation, we entertain the opinion that where there is no contract to the contrary, they do possess this power, and have an undoubted right to tax banking companies as to them may seem proper. And this opinion is in accordance with that of the Supreme Court of the United States, as expressed in the case of Providence Bank of Rhode Island v. Billings and Putnam, 4 Pet. 515.

But the counsel for defendants contend that the Commercial Bank is, by its charter, exempted from the operation of this law. This bank was incorporated on February 11, 1829, 27 Ohio Stat. 72. In section 6 of the act of incorporation, it is provided, among other things, "that the State of Ohio shall be entitled to receive four per cent. on all dividends made by said bank;" and that the demand and payment of this amount shall be made agreeably to the provisions of the act passed February 5, 1825, entitled "an act to amend an act entitled an act to incorporate certain banks therein named, and to extend the charters of existing incorporated banks, passed February 23, 1816." This act of February 5, 1825, although entitled "an act to amend the act entitled an act to incorporate certain banks," etc., was, it is believed, the first law of the state, levying in terms a tax upon banks—and, in truth, this act could hardly be said to do this. Previous to this time, a portion of stock had been, or ought by law to have been, set off to

the state in each of the banks as a bonus. By this act, however, 127] *this bonus was relinquished to the banks, upon condition "that each bank wishing to avail itself of the provisions of this act, shall pay to the State of Ohio ten per cent. upon all dividends made by such bank, after the acceptance of the charter or extension thereof, under the act of which this is an amendment, and previous to the passage of this act, and four per cent. on all dividends that shall hereafter be made by such bank, until otherwise provided by law." Next follows a clause reserving to the legislature the right of levying a tax either upon the capital stock or dividends of said bank, such as might be deemed reasonable and proper. The reservation of this power shows conclusively, that, in the opinions of those who enacted the law, without such reservation the power could not be exercised.

This law was in force at the time of the incorporation of the Commercial Bank, and in requiring of this bank the payment of four per cent. on its dividends, it was, in that respect, placed upon the footing with the other banks then in operation. It was probably the intention, as is suggested by plaintiff's counsel, to grant to it no greater privileges, nor subject it to any heavier burdens than were enjoyed by, or imposed upon those institutions. But the clause in the amendatory act, reserving to the state the power of taxation, was omitted in the act to incorporate the Commercial Bank. The only reference made in that act is for the purpose of prescribing the mode of enforcing the payment of this four per cent., and so far, and for this purpose, that act may be considered as constituting a part of the act of incorporation.

On January 31, 1831, the act of incorporation was amended, the bank not having before that time come into operation, but still no change is made in that feature, which relates to the four per cent. or the power of taxation. 3 Chase's Stat. 2065. On January 15, 1833, the capital stock of said bank was authorized to be increased to an amount not exceeding one million of dollars, "which stock shall be subject to all the regulations, restrictions, and limitations provided for in the act establishing the said bank." 3 Chase's Stat. 2077.

On March 12, 1831, the act to tax "bank, insurance, and bridge companies," was passed, and the question to be determined, is, whether that act can be so construed as to extend to the Commercial Bank. As already remarked, this bank is within the general

provisions of this act. But it is *contended by the defend- [128
ants' counsel, that, owing to the peculiar features of the act of incorporation, this general law for taxing banks, etc., can not be brought to operate so as to collect the percentage prescribed from this particular bank.

We take it to be well settled that the charter of a private corporation is in the nature of a contract between the state and the corporation. Had there ever been any doubts upon this subject, those doubts must have been removed by the decision of the Supreme Court of the United States in the case of Woodward *v.* Dartmouth College, 4 Wheat. 518. Powers once granted can not be revoked; nor can any material change be made in such act of incorporation unless by the assent of the corporation themselves. Hence it is customary in the legislation of this state, to reserve the power of change or alteration, where it is desirable that such power should remain in the state.

The mere fact of incorporation, however, does not exempt the body incorporated from taxation. And, in our opinion, a corporation may be taxed in its business and property with as much propriety, at least, as may an individual, unless there is something in the act by which it is constituted which exempts it from this burden. So far as respects the property of the Commercial Bank, there is no pretense that it is exempted from taxation. If it have lands, or houses, or personal property, which would be taxed in the hands of an individual, the same property may be taxed when belonging to the bank.

The clause in the charter which is supposed to exempt the Commercial Bank from the payment of a tax upon its business similar to that paid by other banks, is that which has been already quoted: "The State of Ohio shall be entitled to receive four per cent. on all dividends made by said bank." Now, let us for a moment examine this subject, considering the charter as a contract, and applying to it the ordinary rules of construing contracts.

The general assembly propose to confer upon such persons as shall become stockholders in the bank certain powers and privileges. They propose to confer upon them all the privileges of banking. But, as these privileges are valuable to the recipients, it seems to be but right and proper that a suitable return should be made for the benefit received. Therefore the legislature impose upon the corporators, in their corporate capacity, the condition

129] that they shall pay to the state four *per cent. on their dividends, and they reserve to themselves no right to change these terms. The only consideration required, the only consideration to be paid, is this four per cent. In other words, the general assembly say to such persons as may take the stock, you may enjoy the privileges of banking if you will consent to pay to the State of Ohio, for this privilege, four per cent. on your dividends as they shall, from time to time, be made. The charter is accepted, the stock is subscribed, and corporation pays, or is willing to pay, the consideration stipulated, to wit, the four per cent. Here is a contract, specific in its terms, easy to be understood. Privileges are proffered for a certain and definite consideration to be paid; and those privileges being accepted, the payment of the consideration can be enforced. After a contract, similar to this, between individuals, where one undertook to convey any interest to another for a definite consideration, and the conveyance is made and accepted, it will not be pretended that anything more than the definite consideration can be recovered. But a contract between the state and individuals is as obligatory as any other contract. Until a state is lost to all sense of justice and propriety, she will scrupulously abide by her contracts, more scrupulously than she will exact their fulfillment by the opposite contracting party.

As here was a contract between the state and the corporators of the Commercial Bank, in their corporate capacity, that the latter should enjoy certain privileges, in consideration of certain payments to be made, any law requiring the payment of a greater amount varies this contract, and impairs its validity. Section 10 of the first article of the constitution of the United States provides, that no state shall pass any law impairing the obligation of contracts; and section 16 of article 8 of the constitution of Ohio, that "no *ex post facto* law, or law impairing the valdity of contracts, shall ever be made." A law, then, made in express terms, and for the avowed purpose of collecting a greater tax than four per cent. upon its dividends, from the Commercial Bank, would be in contravention of both these constitutions, and could not be enforced, unless we adopt the principle that an unconstitutional legislative enactment is a binding law of the land; unless we adopt the principle that the law-making power is above the constitution under which it acts; unless, in fact, we adopt the principle, that, in this 130] country, where we boast of constitutional *and limited gov-

ernments, legislative supremacy is co-extensive with parliamentary omnipotence. If a law, such as is above referred to, could not be enforced, certainly a law which purports to tax banks generally, without specifying this bank particularly, can not be extended by construction to operate upon this bank, but must be so construed as to exclude it.

It may be thought that, inasmuch as there is no clause in the charter expressly limiting the power of taxation, therefore that power may be exercised to any discretionary extent. But such seems not to have been the understanding of the general assembly. In the act of February 6, 1825, which required of the several banks which should comply with its requisitions, to pay four per cent. upon their dividends into the state treasury, it was deemed necessary to stipulate expressly, that the legislature should have power to levy an additional tax. This could not have been necessary, except upon the hypothesis, that, upon the relinquishment, by the state, of the stock by her held in the banks, upon the consideration of the payment of the two and the four per cent. would be such a contract as would prevent her from subsequently levying any additional tax, unless the right so to do was expressly reserved. There is not, however, any such reservation in the act incorporating the Commercial Bank of Cincinnati.

On March 3, 1834, the Clinton Bank of Columbus was incorporated (32 Local Laws, 419). In section 6 of the act of incorporation, provision is made that five per cent. on its dividends shall be paid into the state treasury, and lest this should operate as a restriction upon further taxation, it is provided in section 16, that nothing contained in section 6 shall be so construed as to prevent the legislature from increasing the tax, provided that the said tax shall, at no time, exceed the tax upon the other banks of the state, except the Commercial and Franklin Banks of Cincinnati. The Clinton Bank is referred to as one among many others, containing the same, or a similar provision. Why is the exception made as to the Commercial and Franklin Banks? But one answer can be given, and that is, that the general assembly supposed that the rate to be paid by these banks was fixed in their charters, and could not be changed by legislative enactment. The rate is fixed, although there is this difference between the two institutions, the *Franklin Bank is required to pay five per cent upon its [131 dividends, while the Commercial pays but four. The reason for

this difference probably is, that when the Franklin Bank was chartered, the other banks of the state were taxed five per cent. For it is not to be supposed that either of these institutions were peculiar favorites with the general assembly, or that it was intended to distinguish them from other similar institutions; although owing to some unknown circumstance, they have obtained an advantage which can not be taken from them by legislative authority, or by any decision of the court.

Although there is not any express stipulation in the charter, restricting the power of the legislature to tax, there is a provision equivalent thereto. The price at which the privileges granted are to be enjoyed is fixed at four per cent. on the dividends; and this fixing of the price precludes the idea that any more onerous condition shall be imposed.

Another view may be taken of the case, which goes to strengthen the positions already assumed. This bank, by its charter, is bound to pay into the state treasury four per cent. on its dividends, as they are made. Suppose the legislature reduce the tax upon banks to two or three per cent., or suppose they should entirely repeal the law taxing banks, etc., still the Commercial Bank would be bound to pay the four per cent. Its charter would remain the same, and its liabilities would not be altered. If, then, a repeal of the law taxing banks would not operate to the advantage of this institution, certainly a general law increasing the tax ought not to operate to its injury.

Upon the whole, a majority of the court are of opinion that the Commercial Bank of Cincinnati is not within the operation of the law to tax banks, insurance, and bridge companies, and that no greater tax than four per cent. upon its dividends can be collected.

Judgment will be entered in favor of the plaintiff for nine hundred and five dollars and forty-four cents, without costs.

Judge COLLETT dissented.

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*THE STATE OF OHIO v. NEIL AND MOORE. [122

The act of the general assembly of the state, exacting toll upon passengers carried by mail stages on the Cumberland road, in Ohio, is constitutional.

THE action is brought to recover of the defendants, who are mail contractors, certain amounts of toll claimed by the plaintiff to be imposed by the laws of the state on passengers in coaches, in which the defendants conveyed the United States mails.

The general assembly, on February 4, 1831, passed an act providing that, whenever the consent of Congress should be obtained to that act, the governor should be authorized to take the National road under his care, and erect toll gates, and collect tolls at a certain rate therein specified; with a *proviso*, that no toll should be collected for the passage of any stage coach conveying the United States mail, or horses bearing the same. Section 15 provides that it shall be lawful for the general assembly, at any future session, without the consent of Congress, to change, alter, or amend said act, but no alteration shall be made so as to reduce or increase the rates of toll established below or above a sum necessary to defray the expenses incident to the preservation and repair of said road, to the erection of toll gates thereon, and for the payment of the fees or salaries of the superintendent, the collector of tolls, and such other agents as might be necessarily employed in the prosecution and repair of the road, according to the true intent and meaning of the act.

An amendatory act was passed on June 14, 1832, with the same clause of exemption from the payment of tolls; and a third statute of March, 1834, declares it to be the duty of every stage driver to repeat at each gate, to the keeper, the number of seats occupied in such stage or coach, and to pay at the rate of four cents for each seat so occupied.

The declaration avers that a large number of passengers so occupying seats passed the toll gates on said road, and that a large sum of money is due the plaintiff therefor, under the provisions of said law, to wit: the sum of twelve hundred dollars.

To this declaration the defendants demurred specially, and assigned for cause:

1. That it did not appear by what authority the plaintiff assessed

the tolls in the declaration mentioned. 2. That the act of as-
133] sembly was not fully set out, and no profert of it *made. 3. That the act imposing the toll is unconstitutional. 4. That it did not appear that the gate keepers demanded the tolls, or that the stage drivers refused to give an account of the passengers.

McMahan and Kennon, for the plaintiff.

Goodenow and Peck, for the defendants.

Opinion of the court, by Judge Wood:

The counsel of the defendants appear to abandon the two first causes assigned, as they do not discuss them in the argument, and the other will, therefore, only be noticed by us. First, then, is the act of the general assembly, imposing this toll, *unconstitutional?* Or, in other words, is it a tax on the coach itself, calculated, in its consequences, to impede or obstruct the conveyance of the United States mail? *We hold the negative.* The coach, the horses, the drivers, and the proprietors, are exempted *in express terms.* But it is said that contracts for the transportation of the mail were made in reference to the conveyance of passengers. Such may have been the case. The postmaster-general is not authorized, however, to make any contract exempting passengers, either in coaches or on foot, from the payment of toll. His contracts can extend only to the mail and the mode of its conveyance. The defendants have the right to the road secured to them by the acts of Congress and of the assembly, free from toll, for such carriages, horses, and attendants as may be necessary to enable them fully to comply with their contracts; but when they attempt to go beyond this, and resort to means to increase their profits not necessarily connected with their contracts, they, like others, are rightfully subjected to the *inconvenience* of paying the toll which the *convenience* of a good road imposes. The proposition can not, we think, be maintained, that passengers are necessary for the conveyance of the mail; and if they are not, a tax on them is, in no light in which the subject can be viewed, a tax on the coach itself, nor calculated in its consequences to impede or obstruct the transportation of the mail.

2. Should the declaration aver that the gate keepers *demanded*
134] the toll, or that the stage drivers *refused* to give an *account

of the passengers? The act of March 1, 1834, provides that there shall be charged and collected, and it shall be the duty of each gate keeper *to demand* and receive, for the passing such gate, four cents for every person occupying a seat in any mail stage, excepting drivers, agents, and proprietors. The opinion that a demand was necessary must have arisen from the language of this section, but it appears to us only to be directory to the keeper of the gate. It is his duty to make a demand; but suppose he does not, is not the toll collectible? We think it is. But if he make such demand, it does not follow that it must be averred in the declaration and proved on the trial, for the very next section of the act provides that the stage drivers shall *report* at each gate, to the keeper, the number of seats occupied, and shall *pay* at the aforesaid rate, and in default thereof, the keeper *shall charge* the proprietors at the rate aforesaid. Construe both these sections together, and there is a complete legal liability by passing the gates, without the number of passengers reported to the keeper and paid for by the driver, and a *demand* is unnecessary. The demurrer is sustained.

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THE STATE OF OHIO, ON THE RELATION OF SAMUEL H. GOODIN, *v.* DAVID K. ESTE, PRESIDENT, THOMAS HENDERSON, JONATHAN CILLEY, AND JOHN BURGOYNE, ASSOCIATE JUDGES OF HAMILTON COUNTY.

The appointment of a clerk of the court of common pleas, must be the act of the court, made in open court and entered on the minutes.

The annunciation from the court, in session, that A. B. is appointed clerk vests no such right as precludes the court from subsequently refusing to have the appointment entered on the minutes. Even such entry does not compel the acceptance of the bond, and upon taking the oath, an induction into the office; but upon reading the journal entries, and before the minutes are signed, the order may be rescinded.

THIS case was reserved in the county of Hamilton.

On May 19, 1835, and during the session of the Supreme Court in the county of Hamilton, Samuel H. Goodin filed in said court an affidavit setting forth that, at the term of February, 1834, of

the court of common pleas for said county, on Saturday, the 12th day of April, a day in said term, the court being in session and all the judges being present, the office of clerk of said court being vacant, said court then and there appointed the deponent clerk of said court, which appointment, signed by three of the judges, was delivered to the deponent.

The deponent further stated, that the said court at the same time 135] handed to David Gano, acting clerk *pro tem.* of said *court, in writing, the form of an entry of said appointment, to be by him entered on the minutes of the proceedings of said court for that day, directing him to enter the same on the minutes of the proceedings of said court, and then adjourned over until Monday morning, the 14th of the same month of April.

That the said Gano failed and refused to enter the same, and on the meeting of the court on Monday morning, all the judges being present, and in session, two of them, to wit: Judges Henderson and Burgoyne, dissented from, and objected to, the entry thereof upon the minutes of said court, directing the clerk *pro tem.* not to place the same upon the minutes, the other two judges, to wit: Judges Goodenow and Cilley, then and there directing the said clerk *pro tem.* to make the entry. And the court being so divided, the said clerk *pro tem.* then and there refused and still refuses to make entry of said appointment.

That on the 16th day of April aforesaid, the court still being in session, the deponent offered to give the bond required by law, for the faithful discharge of the duties of clerk, with such security as should be approved by the court. That he produced his bond in court, and offered to take the oath of office, but two of the judges refused to approve of the bond without objecting to its sufficiency, and also refused to permit him to take the oath of office, or to enter upon the execution of the duties of the office; the other two judges at the same time consenting and agreeing that he might give bond as aforesaid, take the oath of office and enter upon the execution of its duties. And the court being so divided in opinion, the application of the deponent was then and there refused.

That the deponent, previous to his appointment, had received a certificate of a majority of the judges of the Supreme Court that he was qualified to discharge the duties of clerk of said court of common pleas, which said certificate was before said court of common pleas, when the said appointment was made as aforesaid.

That said court adjourned without day, on the 17th day of April aforesaid, not having made entry of the appointment aforesaid, and without permitting the deponent to enter upon the execution of his office.

The deponent further states, that afterward, to wit: on August *4, 1834, in the term of August of said court of common [136 pleas, he appeared before said court of common pleas in his own proper person, and then and there tendered, for their approval, to said court his bond with securities for the faithful discharge and performance of the duties of clerk; and on the same day tendered and delivered to said court a certificate, that he had taken the oath of office as clerk as aforesaid, and then and there offered to enter upon the execution of the duties; and also then and there moved the said court to be permitted to enter upon the duties of the said office, and that said bond and oath of office might be entered upon the records of said court, and also moved said court to order the books and papers of said office to be delivered over to him. But two of the judges, to wit, Thomas Henderson and John Burgoyne, refused to grant said motions, refused to permit said bond to be filed, although they did not object to its sufficiency, and also refused to permit the deponent to enter upon the duties of his said office; and the other two judges, to wit, John M. Goodenow and Jonathan Cilley, decided in favor of the motions aforesaid, and the court being so divided in opinion, said motions were then and there overruled, and the deponent excluded from his office.

The deponent further states, that he is advised and believes, that by the appointment aforesaid, by the laws of the state of Ohio, he is legally entitled to the office of clerk as aforesaid, and that he is unjustly and illegally deprived of the exercise of the duties thereof. And that he is informed and believes that William H. Harrison is in the performance of the duties of said office to the exclusion of the deponent without any legal right or authority whatever.

This affidavit was sworn to on May 11, 1835, and in it reference is made to the following papers, to wit:

1. A copy of the certificate of the judges of the Supreme Court of the qualification of Samuel H. Goodin, to perform the duties of clerk of the court of common pleas of Hamilton county.

2. The certificate of appointment, in these words:

"We agree to the appointment of Samuel H. Goodin to the office of clerk of the court of common pleas of Hamilton county.

"JOHN M. GOODENOW, P. J.
JOHN BURGOYNE,
"*April* 12, 1834. JONATHAN CILLEY."

137] *3. Copy of an order handed to Daniel Gano, clerk *pro tem.*, to be entered upon the minutes of the court as follows: "It is ordered that Samuel H. Goodin be, and he is hereby appointed clerk of this court for the constitutional term of seven years."

And also an entry made on the minutes of said court, on April 18, 1835, by J. M. Goodenow, president judge, in the following words: "I sign this journal with the protest, that it is not complete, for want of an entry of the appointment of Samuel H. Goodin, clerk."

4. A bond tendered by said Goodin, to the judges of the court of common pleas, on August 4, 1834, on the back of which is the following indorsement:

"Filed August 4, 1834, or rather presented to the court on that day, and Judges Henderson and Burgoyne refused to let them be filed. "JOHN M. GOODENOW."

5. Copy of the oath of office of Samuel H. Goodin, presented to the judges of the court of common pleas, on August 4, 1834, certified as having been made on the 7th of May of the same year, before R. Mulford, a justice of the peace, upon which is the following indorsement:

"Filed August 4, 1834, or rather presented to court on that day, and Judges Henderson and Burgoyne refused to let it be filed.

"JOHN M. GOODENOW."

6. Copy of an entry which Goodin moved the judges of the court of common pleas to admit on the minutes of said court, on August 4, 1834, which is as follows, to wit:

"'Samuel H. Goodin, who claims that he was legally appointed the clerk of this court at the February term thereof, 1834, now comes into court and tenders his bond, with securities as such clerk, and moves the court to approve thereof; and also tenders his oath of office, duly administered, to the said court, and moves the court to admit him to enter upon the execution of the duties of his office as clerk.' The court, being divided in opinion, re-

fused to approve of the said bond; and also refused to admit him to enter upon the execution of his office as aforesaid. August 4, 1834."

Upon the affidavit aforesaid, together with the documents referred to, the Supreme Court, on motion of S. H. Goodin, granted a rule upon the judges of the court of common pleas, to show cause at the opening of said Supreme Court, on May 27, 1835, why a *mandamus* should not issue to *compel the said court of [138 common pleas to admit the said Goodin to file his bond, and take upon himself the discharge of the duties of clerk of that court, pursuant to his appointment, made, as alleged, by that court on April 12, 1834.

In pursuance of this rule, the judges of the court of common pleas showed cause respectively.

Judge Henderson states that he is not advised, nor does he know that Goodin was ever appointed clerk of said court of common pleas. That his claim to said office rests altogether upon the assurances and promises of others, as the defendant supposes, as he had nothing to do with the matter. He was never consulted with respect to it, nor did he ever attend to it. From these considerations, both Judge Burgoyne and himself refused to permit an entry to be made on the minutes of said court of common pleas of an appointment of said Goodin as clerk, which alleged appointment, so far as obtained, they considered as surreptitious, and of a character demonstrating the impropriety of investing him with the office. He protests against Goodin's being placed in the office of clerk of the common pleas, as he believes it is now legally and rightfully filled by another.

Judge Este states that he does not know that Goodin was ever appointed clerk of the court of common pleas aforesaid. That he has examined the minute book of the court as well as their records and proceedings relative to the alleged appointment, and finds the following entries only, to wit: "April 18, 1834. I sign this journal with the protest, that it is not complete for want of the appointment of Samuel H. Goodin as clerk. John M. Goodenow, president judge." Which is followed by the signatures of Judges Henderson and Burgoyne, denying that any legal appointment of clerk was made, etc.

He further states that he was qualified and took his seat as president judge of said court of common pleas, on December 22, 1834; that he then found William H. Harrison officiating as clerk,

and as such recognized by the judges of said court; and that upon further examination of the minutes of said court, he ascertained that Harrison was, at the August term, 1834, appointed clerk for the term of seven years, gave bond and security and took the official oath. From all which premises he insists that sufficient cause is shown why the said court ought not to be compelled to admit
139] S. H. Goodin to *file his bond, and take upon himself the discharge of the duties of clerk, etc.

Judge Burgoyne insists that Goodin was not, at any time, legally appointed clerk of the court of common pleas; and, further, that at the term of August, 1834, William H. Harrison was appointed to said office, gave bonds to the acceptance of the court, and took all necessary official oaths.

Judge Cilley admits the appointment of Goodin, as stated in the affidavit and accompanying documents, and that he was not permitted to enter upon the discharge of the duties of clerk in consequence of the opposition of Judges Henderson and Burgoyne; and, in consequence of the same opposition, no entry was made of the appointment upon the minute book.

He further states, that without his approbation William H. Harrison was, at the August term, 1834, appointed clerk of the same court, and entered upon the discharge of the duties of the office.

MORRIS, for the relator:

The questions presented for the consideration of the court are:

1. Whether the relator has a right to the office he demands.

2. If he has that right, do the laws of the State of Ohio afford him a remedy by a writ of *mandamus* issuing from this court.

By the constitution and laws of the state the Supreme Court and the court of common pleas are authorized to appoint their respective clerks. State Constitution, art. 3, sec. 9; 29 Ohio L. 57.

The court of common pleas exercised their appointing power in the proper manner in the appointment of Goodin; and, having made the appointment, they could not recall or reverse what had been legally done. An entry on the journal is not necessary to the validity of the appointment. It is not required by law—an appointment is complete without it; and, being made, can not be defeated by the fraudulent or improper conduct of the acting clerk to make the record. 1 Cranch, 137; 3 Hen. & Munf. 1.

If the relator was legally appointed clerk, the proper course for

him to pursue, in order to obtain the evidence of his appointment, and to place him in the exercise of the duties of his office, is by writ of *mandamus*. 1 Cranch, 137; 2 Hen. & Munf. 1.

*HAMMOND, FOX, and WORTHINGTON, for respondent: [140

In the present case, there is one question to be decided which relates to the form of proceedings—whether the rule to show cause should be issued to the court of common pleas as a court, or to the individual judges of the court.

We contend the rule should issue to the court of common pleas, not to the individuals composing that court. It is the action of the court which is required, not the action of the individual judges.

Upon the merits of the case we conceive the rule must be discharged. The cause alleged, by a majority of the judges, why a *mandamus* should not issue, is that the relator was never appointed clerk. The return must be taken as true. 4 Ohio, 351.

But if the affidavit of the relator is taken as true no cause is shown for issuing a *mandamus*. The relator has no right to file his bond and enter upon the discharge of the duties of clerk unless he has been first appointed. An appointment can only be made by order of the court, and no order is valid unless entered upon the minute book and signed by the president judge. 3 Ohio, 577; 4 Ohio, 130; 5 Ohio, 363, 450.

The applicant must show a clear, legal right to discharge the duties of the office of clerk or a *mandamus* will not issue. If the right remained doubtful the court will compel him to resort to the writ of *quo warranto*, particularly where there is an incumbent in the office claiming to be legally appointed. 2 Esp. N. P. 665, old ed.; Com. Dig., tit. Mandamus, B; Ib., c. 3; 1 Johns. Cas. 134; 2 Bl. Com. 110, 111; 1 Johns. Cas. 79.

With the appointment of a clerk of the court of common pleas, this court have nothing to do. By the constitution each court has the exclusive power of appointing its own clerk.

J. C. WRIGHT, for the relator, in reply:

It is insisted that the rule should have been addressed to *the court* and not to *the judges* of the court. Authorities are abundant, in favor of directing the rule to *the judges*. 1 Johns. Cas. 179, 181; 2 Johns. Cas. 68, 118, 215; 4 Ohio, 357; 3 Hen. & Munf. 1; 9 Mass. 388; 2 Pick. 414; 4 Pet. 102.

141] *The authority of this court to issue a writ of *mandamus*, in the case made, is denied unless the relator is found invested with the right. This court is authorized, by statute, to issue the writ, 29 Ohio Stat. 56; and it issues to prevent a failure of justice, and may be used on all occasions wherein justice and good government; there ought to be one, and the law has provided no other specific remedy. Bac. Ab., Mandamus, D. E.; Com. Dig., Mandamus; 4 Ohio, 357; 5 Ohio, 543; 6 Cranch, 115.

Counsel for the respondents further insist that the relator was not appointed, because the minutes show no entry of the appointment. This is the very thing of which we complain. We say the entry ought to have been made, and the object of this proceeding is to procure it to be made. The appointment was perfected when announced in open court, and the neglect of the clerk *pro tem.* to perform his duty by making the entry can not divest the relator of his right to the office. When the appointment was made the power of the court over the office was at an end, and it was the duty of the acting clerk to make the entry. It was the duty of the court to compel him to make it. And that court having failed to perform this duty, it is incumbent on this court to compel them to do it by process of *mandamus*. Upon this part of the case the reasoning of the Supreme Court of the United States, in the case of Marbury *v.* Madison, 1 Cranch, 14, is peculiarly applicable.

Judge HITCHCOCK delivered the opinion of the court:

The first question which presents itself to the court for consideration is, whether Samuel H. Goodin, the relator, has a right to the office which he now demands. In order to settle this question, we are disposed to disregard any technical objections, and to consider all the facts as they are presented to us by the papers submitted. Those facts are substantially as follows: On Saturday, April 12, 1834, the court of common pleas for the county of Hamilton, being then in session, and the office of clerk being vacant, a written paper was handed to Goodin, signed by three of the judges, in form following: "We agree to the appointment of Samuel H. Goodin to the office of clerk of the court of common pleas of Hamilton county." At the same time the form of a journal entry was handed to the clerk *pro tem.* with directions to
142] have the *same entered on the minute book, in the follow-

ing words: "It is ordered that Samuel H. Goodin be, and he is hereby appointed clerk of this court for the constitutional term of seven years." And the court then adjourned until the next Monday morning. It does not appear that the certificate of appointed was presented to the fourth judge, and he denies that he was consulted on the subject.

On Monday morning it was discovered that the journal entry, for some cause, had not been made, and two of the judges refused to permit it to be made, insisting that Goodin had not legally been appointed clerk, and protesting against his appointment; the other two judges at the same time insisting upon his appointment. In consequence of this opinion, the clerk refused to make the entry, and it has never been done.

On the 16th day of April, and before the final adjournment of the court, the relator appeared before the court, and produced a bond conditioned as the law directs, for the faithful discharge of the duties of clerk, which bond was signed by himself and a number of individuals, which bond was offered for the acceptance of the court. No objection was made to the sufficiency of the bond, but objections were made by two of the judges to its acceptance, and, of course, the court being equally divided in opinion, it was not accepted. At the same time the relator offered to take the oath of office, but owing to the same division of opinion, this also was refused.

On the 7th of May he went before a justice of the peace and took the oath of office, the court not then being in session.

At the August term of the court, and on the 4th day of that month, the relator again came into court, and tendered the aforesaid bond, and moved the court to approve of the same; he also tendered a certificate of his oath of office, and moved the court to admit him to enter upon the execution of the duties of the office of clerk. But the court being still divided in opinion as to his appointment, the motions were refused.

At the same August term, William H. Harrison was appointed clerk of the court for the term of seven years, was qualified as the law directs, and entered upon the execution of the duties of the office.

Do these facts evince that the relator has been legally and constitutionally appointed; that he is, in truth, entitled to the *office of clerk of the court of common pleas of Hamilton [143

county? If so, he is deprived of a right, and the law must furnish an adequate remedy.

Section 7, of article 3, of the constitution, provides that, "each court shall appoint its own clerk for the term of seven years." There is no other restriction than this: that the court of common pleas shall not appoint any person to this trust for this term of time, unless he first produce a certificate signed by a majority of the judges of the Supreme Court, that they judge him well qualified to execute the duties of the office. This right being secured to the several courts, this court will rarely, if at all, interfere with its exercise. There may be cases where it would be proper to do it, but such cases must be extremely clear and free from doubt.

The mode of appointment is not specified in express terms, either by the constitution or the law; but as it is an act of the court, we apprehend, like every other act, it must be done by an order. It is not sufficient for the judges to give to the applicant a certificate that they have agreed, or do agree to appoint him to that office. This, of itself, can be considered in no other light than as a pledge from the individuals signing the paper that he should be appointed. Neither would a certificate by the individual members of the court, that the applicant had been appointed, be an appointment; nor would it be legal evidence of an appointment, because it would be a personal act of individuals, not their act as a court.

It is true that, from necessity, this court does sometimes make *pro tem.* appointments, when not holding court in the county for which the appointment is made, but never to continue for a longer period than until the commencement of the next succeeding term. It is done to prevent a failure or delay of justice. The same necessity does not exist in the court of common pleas. In case a vacancy occurs in the office of clerk in that court, the law makes provision that the associate judges who are residents of the county, and who may be easily convened, may appoint *pro tem.* 29 Ohio Stat. 58. But a permanent clerk can not be appointed, either by the Supreme Court or court of common pleas, except in open court, and also by an order of court. Such seems to have been the construction put upon the law by the court of common pleas in the case before us. For, notwithstanding a certificate of

144] the agreement of three of the judges to appoint *him, was

given to the relator, yet the attempted appointment itself, was by order of court, as is manifest from the form of journal entry, handed to the clerk *pro tem.*

By section 94 of the practice act, 29 Stat. 75, it is provided, "that for preventing errors in entering the judgments, orders, and decrees of each court, the judges thereof, before every adjournment, shall cause the minutes of their proceedings to be publicly read by their clerk, and corrected when necessary, and the same shall be signed by the president judge, then sitting in court; which minutes, so signed, shall be entered in a book and carefully preserved among the records; and no proceedings, orders, judgments, or decrees of either of the said courts shall be in force or valid, until the same be so recorded and signed."

Under this section, the order of appointing a clerk as well as every other operative order of the court, must be entered upon the minute book, and until it is so entered, and the minute book signed by the presiding judge, it can not "be in force or valid;" in other words, the appointment is not complete. If this be a correct exposition of the law, Goodin was not appointed clerk of the common pleas for the county of Hamilton. No order appointing him has ever been inserted in the minute book of the court. But it is said this is the very thing complained of. That the order was in fact made, and the object of the relator is to compel the court of common pleas to have it entered upon the minute book. This is claimed upon the hypothesis, that the fact of the appointment having been announced from the bench, it was so far made, that no change could afterward take place, neither could it be recalled. But is it so? Suppose a court should announce the name of an individual as appointed to the office of clerk, and immediately thereafter should discover that he was in no way qualified to discharge the duties; might not another appointment be made? Would it be improper for the court to direct that no entry upon the minute book should be made? Or suppose, that through mistake, the name of a wrong individual should be announced, might not the mistake be corrected? The term of court is in law considered as one day, and during the term as a general rule every subject is open for reconsideration and correction. And this, to a certain extent, must be the case with respect to the appointment of clerk. After the announcement of the appointment, *although the order making it is regularly entered, [145

still, before the individual can proceed to discharge official duties, he must take an oath of office, and also give bond, with security to be approved of by the court. After all this is done, it would be too late for the court to interfere with the office, unless for good cause shown. But, until this is done, the individual appointed, has no right to demand the office. Until it is done, if the court, making the appointment think proper, in the exercise of their discretion to rescind the order, and make another appointment, I am not prepared to say that there would be sufficient ground to justify the interference of this court. On the contrary, it seems to me that the office is within the control of the court until the bond is approved. The cases of Marbury *v.* Madison, 1 Cranch, 137, and of Drew *v.* The Judges of the Sweet Springs District, 3 Hen. & Munf. 1, have been cited as opposed to these principles.

In the case of Marbury *v.* Madison, the court decided that there must be some point of time when the power of the appointing authority over the officer must cease, when the officer is not removable at will. That this must be when the power of appointment has been exercised. And the power has been exercised when the last act required from the person possessing the power has been performed. In that case the appointing power was in the president, and the last act was the signature of the commission. If we apply these principles to the case now under consideration, they rather sustain than controvert the position before laid down. In this case the court of common pleas was the appointing power. By the order before referred to, had the same been regularly entered on the minute book, no authority was given to the relator to enter upon the duties of the office. He must take the oath of office; he must also give bond. And here another act is to be performed by the court—the appointing power, and that is to approve of the bond. When this is done the appointment is complete, and not before. Had these things been done Goodin would have been clerk of the court, and would have had the right to demand the office.

The case of Dew *v.* The Judges of the Sweet Springs District Court, in some of its general features, is like the case under consideration. It requires, however, but a slight examination to see
146] that that case turned upon the *construction of certain Virginia statutes. What those statutes are we know not, except so far as can be gathered from the report of the case. Sufficient can be

collected from this to show that they are materially different from our own, and, of course, the case can not be considered as authority here.

Upon the whole, we are of opinion that the relator has not established his right to the office of clerk. And such being the opinion of the court, it is unnecessary to inquire as to the power of this court to issue a writ of *mandamus* in a proper case made, or to examine the question whether it would be a proper mode of proceeding where the court of common pleas had wrongfully dispossessed a clerk of his office.

The rule is discharged.

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LESSEE OF DAVID DRESBACK ET AL. *v.* DUNCAN M'ARTHUR.

The owner of a survey of lands in the Virginia military district has not a legal estate upon which he can maintain an ejectment.

A collector's deed as upon a sale for taxes, though insufficient to convey title, may be given in evidence on the trial of an ejectment, as an item of proof to show the extent of the possession claimed under it.

Upon a question of the better right of possession, in ejectment, the plaintiff claimed a naked possession only, proof that the defendant came into possession under a writ of *habere facias possessionem*, on a judgment in a case where the lessor of the plaintiff, in this case was defendant, is admissible, and the fact when proved, gives to the defendant the better right of possession.

THIS action of ejectment was submitted to a jury in the county of Pickaway.

The lands in controversy are within the Virginia military district, and the declaration in ejectment contains several demises. Amongst others, one from Dresback, Apple, Ely, and one from John Tench.

On the trial, the plaintiff proved that previous to June, 1814, and at that time, one Nathan Kennedy and those claiming under him were in possession of the premises. That on the 13th day of July aforesaid, John Carlisle recovered a judgment against Kennedy, in the court of common pleas of Pickaway county, and on the 27th day of the same month sued out his writ of *fi. fa.* upon

this judgment. This execution was levied upon the premises in controversy, consisting of two hundred and fifty acres of land, and the land purchased at sheriff's sale by Dresback, Apple, and Ely, on August 14, 1814, and conveyed in pursuance of the sale, by the sheriff of the county, by deed duly executed.

The plaintiff then offered in evidence a deed from John Carlisle, as collector of taxes, to Nathan Kennedy, dated June 3, 1803, purporting to convey to the said Kennedy two hundred and fifty acres of land on sale for taxes; and also offered evidence to prove 147] that John Carlisle was at the time of the *date of said deed collector of taxes in the Virginia military district, but offered no evidence to prove that the land had been regularly entered for taxation, or that it had been legally sold. The deed was objected to by the defendant's counsel, but was admitted by the court for the express purpose of defining the boundaries of Kennedy's possession, and for no other.

The plaintiff next offered in evidence a survey of John Tench, No. 456, of twelve hundred acres, connected with proof, that the premises in controversy are included in said survey. This testimony was objected to by the defendant's counsel, and rejected by the court.

The defendant then offered in evidence the record of a judgment in ejectment on his own demise against Dresback, Apple, Ely, and other defendants, rendered in the Supreme Court at August term, 1818, and also a writ of execution issued upon the same judgment, in virtue of which he was put in possession of five hundred acres of land; and also examined Robert Campbell as a witness, who testified that the premises in controversy were included within the said five hundred acres. To this testimony, the plaintiff objected, but his objection was overruled, and the testimony went to the jury.

The court charged the jury that if they were satisfied that the defendant had come into possession of the premises in virtue of his recovering in ejectment, and writ of possession issued thereon, and that if they believed the testimony of Campbell, they must be so satisfied, then it would be their duty to return a verdict for the defendant.

A verdict accordingly was returned for the defendant.

The plaintiff then moved the court to set aside the verdict and to order a new trial, for the following reasons, to wit:

1. The court erred in overruling the evidence offered of the survey of John Tench.

2. The court erred in the charge of the jury.

3. The verdict is against law and evidence.

DOUGLASS, for the plaintiff, insisted:

That a prior possession of less than twenty years is sufficient to maintain ejectment, and that this possession gives strength from its duration. The deed from Carlisle shows that Kennedy and those claiming under him were in under *color of title; [148 of course the plaintiff does not claim as from a naked possession.

2. The recovery of the defendant, in a former action, could not of itself defeat the right of the plaintiff vested in him in consequence of the prior possession. It was necessary for him to show something beyond this to defeat this possessory right. The doctrine of the case, 16 Johns. 314, relied upon by respondent's counsel and sanctioned by this court on the circuit, sustains the principle that one action of ejectment is a law to another. Whereas no principle is better established than the one directly the reverse of this. 1 Baum. 114; 3 Johns. 270; Til. Ejec. 295, in notes, etc. It is at war with the whole understanding of the profession, and the practice of the courts in Ohio for twenty-six years at least.

3. The prior possession of Dresback, Apple, and Ely is not a mere naked possession. They claim under a deed from the collector of taxes. It has been decided in Massachusetts that "everything necessary to the validity of a collector's deed will be preserved after twenty years, if it be shown that he was collector of the taxes committed to him. 14 Mass. 105, 145, 177. The same doctrine has been lately sanctioned in Kentucky. 2 J. J. Marsh. 436.

4. The court mistook the law in rejecting the survey of John Tench. The plaintiff had a right to recover on his demise from Tench. The owner of a survey has a right to possession. He can maintain ejectment. 1 Peters, 638; 1 Ohio, 402; 3 Ohio, 116; 5 Ohio, 526; 6 Peters, 431; 7 Term, 329; 1 Bibb, 129; 5 Cowan, 200; 2 Caine, 335; 1 Ch. Dig. 353; 3 Ohio, 59, 254, 407.

G. SWAN and LEONARD, for defendants contended:

1. That a party can not recover in ejectment upon a mere naked

prior possession against one *lawfully* in possession. It is admitted to be good law that one in actual possession may sustain ejectment when ousted by a wrong-doer, who has no right of entry, although the English reports show but three cases where the question has been directly considered by their courts. Cro. Eliz. 427; 2 Saund. 112; 2 Johns. 749. The same point was decided in the case of Smith *v.* Serilland, 10 Johns. 338. The court of Kentucky holds there may be cases where a plaintiff in ejectment may recover on bare possession where there has been an actual 149] disseizin *or ouster of the tenant, and the defendant appears to be a trespasser without color of title. 5 Litt. 319. The same view of the question is taken by the courts of Massachusetts. 5 Mass. 319. The exact point which arises in this case was before the court of New York in the case of Johnson *v.* Rightmire, 16 Johns. 314, in which it was determined that the possession set up by the defendant, was acquired under the authority of a judgment at law, and was consequently a lawful entry.

2. The collector's deed conferred no right upon Kennedy or those claiming under him. There was no evidence to show that the land had been entered and surveyed when it was sold for taxes. There was no evidence to show that any of the steps had been taken required by law preparatory to the sale, and the deed was admitted for no other purpose than to prove the extent of plaintiff's claim.

3. The survey of Tench was properly excluded. The owner of a survey has no legal interest. His claim is equitable, and does not confer upon him the right of entry. He can not sustain ejectment. There is a difference between a final certificate issued to the purchaser of Congress lands and an entry and survey in the Virginia military district. The holder of the certificate can not voluntarily relinquish the land while the owner of a survey may withdraw it, and when withdrawn, the land returns to the general mass, to be appropriated to the satisfaction of other military warrants. 2 Wash. C. C. 32; 1 Munf. 442; 2 Bibb, 150; 4 Bibb, 554; 2 Ohio, 263; Adams 32, n. 1, and 247; 1 Ohio, 313; Litt. Sel. Cas. 513; 2 Bibb, 129, 416; 3 Wheat. 212. These authorities establish, beyond contradiction, two principles, first, that entries and surveys are mere equitable titles, and secondly, that such titles will not support ejectment.

DOUGLASS, in reply:

The limitation of the right to recover in ejectment, founded upon

prior possession as stated by defendant's counsel, is entirely too general, and not warranted by authority. They confine it to the case where the prior possessor has been ousted by a wrong-doer who has no right of entry, whereas the prior possession is evidence of an estate in fee. 2 S. N. P. 618; Buller N. P. 103, 109; Salk. 321; 8 Co. 101; 3 Johns. 388; 3 Johns. Cas. 128; 4 Conn. 602; 1 Paine, 457, and such *prior possession puts the defendant [150 upon his defense, upon which he must show title or a possession overreaching that of the plaintiff. 6 Johns. 218; 9 Johns. 197; 3 Ohio, 454–459; 1 Bro. 280; 2 S. & R. 53.

Judge HITCHCOCK delivered the opinion of the court:

Various reasons are assigned in favor of the motion for a new trial, which will be considered in the order presented.

1. It is supposed the court erred in the rejection of the survey of John Tench.

Since the decision of the case of Lessee of Anderson v. Clark and Ellison, 1 Pet. 628, the question has been much litigated within the Virginia military district, as to the nature of the interest which an individual acquires under a plat and survey, whether it be legal or equitable. Upon an examination of that case, I am not aware that any new light is thrown upon this subject. In fact, this question was not before the court for consideration. The defendants claimed to be protected in their possession under a survey in which they were interested, not because they held a legal estate, but because the location in virtue of which the plaintiff's patent issued, had been made on land previously surveyed, and of course the patent was void under the act of Congress of March 2, 1807. The great object was to defeat the plaintiff's title, for in that, as in every other case in ejectment, unless the plaintiff could show some kind of legal title, unless he could show a right of entry, the defendants were secure in their possession. The chief justice says, "lands surveyed are as completely withdrawn as lands patented from subsequent taxation." Again he says, "It may be the defendants may never be able to perfect their title. The land may not be subject to the disposition of Congress. It is enough for the present case to say, that, as we understand the act of Congress, it was not liable to location when the plaintiff's entry was made." These expressions are supposed to sustain the position that a plat and survey confer upon the owner a legal interest. It is true the lan-

guage is strong, but it does not warrant the inference drawn from it. "Lands surveyed are as completely withdrawn as lands patented from subsequent location," so long as the survey subsists, because by the proviso to the first section of the before-mentioned act of Congress, it is declared that no locations after the passage 151] of that act shall *be made upon lands "for which patents had been previously issued, or which had been previously surveyed, and any patent which may nevertheless be obtained for land located contrary to the provisions of this section shall be null and void."

It has been strenuously urged by the counsel for the plaintiff in the case before the court, and it is manifest that he is familiar with the subject, that a survey confers a legal interest. At least, that it confers such an interest as to give to the proprietor the right of entry. If it be true that a survey gives the right of entry, then the court were mistaken in rejecting the survey of Tench. That it does not give a legal estate, in fee, is admitted on all hands. There is much plausibility in the reasoning on this subject. All will admit that the owner of the survey has a better right to the land than a stranger. His right is preferable to that of all others except the government. But the same is the case with all equitable interest as between individuals. The person holding a contract for lands has an interest in those lands superior to any interest in a stranger. Still it is not a legal interest. It is a mere equity. If the contract is complied with, on his part, he can force the legal title from the other contracting party by a proceeding in chancery. But, until he obtains this legal title, we have uniformly held that he could not sustain ejectment unless by the terms of the contract he was authorized to take the possession. In such case, however, should the equitable claimant acquire the possession, and afterward be ousted by a stranger he might sustain ejectment. Not, however, on account of his equitable interest, but on account of his prior possession. The contract itself gives no legal right of entry unless so expressed upon its face. How does the case differ with respect to a plat and survey? If an entry is made in conformity to law—if the land is surveyed, and surveyed according to law and the survey recorded—then, upon the production of the plat and survey, the proprietor is authorized to demand and receive a patent which conveys the legal title. Until the patent issues the legal title is in the government. The

law has prescribed the terms upon which it may be obtained; but that law, in no part of it, gives to the proprietor a right of entry so soon as the entry and survey is made. But so soon as that law, which constitutes the terms of the contract on the part of the governmet, is complied with, then the patent issues as a *matter [152 of course. So soon as it is complied with, the proprietor has a complete equitable interest, of which he can not be divested. And, as in case of a contract between individuals, so here, if the equitable owner acquires possession he will be protected in that possession against a disseizer, and for the same reason.

Counsel have produced no decided case in which it has been held that the owner of a survey could sustain this action. If it had been so decided the case might have been found. Still, after all our research, we have not been able to find any one. But we do find cases in which it has been held that such an interest is merely equitable. In the case of Reed et al. *v.* Bullock et al., Litt. Sel. Cas. 510, the court of appeals of Kentucky say: "But we affirm, without hesitation, that a right acquired by virtue of an entry for lands, is not a legal but an equitable right. It may, indeed, as contrasted with an illegal right, be said to be a legal one, and so may every equitable title. But in the same sense in which a legal right is contradistinguished from an equitable right, it possesses no one attribute of the former and every one which appertains to the latter. *It affords no legal remedy; it can not even be noticed on a trial at law, and is peculiarly and exclusively cognizable in a court of equity.* This was so ruled in the origin of controversies of this sort, and have ever since been undeviatingly maintained by the courts of this country." The same principle was decided in the case of Chiles *v.* Calk, 4 Bibb, 559. Here let it be remembered that no decisions are of higher authority in this class of cases than those of Kentucky. In the case of Roads *v.* Symmes et al., 1 Ohio, 313, it was held by this court that the legal title does not vest until the patent is issued, and we have found nothing to the contrary of this except in the case of Lessee of Bird *v.* Swearingen, 1 Ohio, 409, where the judge, in delivering the opinion of the court, says: "He would have maintained ejectment against any person not having a grant from the government." This question, however, was not involved in the case before the court. It is merely said by way of illustration, and if taken into consideration at all, must be considered as the individual opinion of the judge using the

expression. Although the opinions of no man are entitled to more respect, yet we can not concur with him in this particular, 153] especially when we advert to the fact, that *this case was decided at the same term with the case of Roads v. Symmes, above referred to, in which the reverse of this principle was expressly maintained.

In adopting the principle advocated by the plaintiffs' counsel, we feel that we should be introducing a new rule of decision. That we should overrule, not only our own decision, but should deny the authority of the decisions of the Supreme Court of the United States, and of the courts of some, at least, of our sister states. We are unwilling to do this, but prefer to travel in the plain beaten track, until the law shall be changed by that authority, whose peculiar province it is to supply the remedy, when existing laws are found to be defective.

Upon this point in the case, a majority of the court are of opinion that the law is with the defendant.

2. The second reason assigned for a new trial is, that the court erred in the charge to the jury.

In order to determine this point correctly, it is necessary that we ascertain the true state of facts in the case. The lessors of the plaintiff had proven a possession in Kennedy and those claiming under him as early as the year 1811, which was continued until 1819, when the defendant was put in possession. They had further proven the recovery of a judgment in favor of Carlisle against Kennedy, an execution under that judgment, a sale of the premises, and a purchase by themselves. In order to show title in Kennedy they offered in evidence a deed from John Carlisle to him, executed by Carlisle as collector of taxes, on June 3, 1803, purporting to convey the premises in controversy. This deed was objected to, but it was permitted by the court to go to the jury, not as evidence of title, but to show the boundaries of Kennedy's claim. But it seems to be supposed by the plaintiff's counsel, that inasmuch as it was before the jury, it was their right to consider it for any other purpose. It will not, however, I apprehend, be contended that they could give it any other than a legitimate effect. Suppose we give it that effect. It is a deed from a collector of taxes due prior to 1803, and before the organization of the state government, unaccompanied by any evidence to show that the lands had been subjected to taxation, that they had been entered

upon the duplicate, or that a single preliminary step had been taken to render the sale valid. There was no evidence *that the lands had been sold, except such as is derived from [154 the deed itself. Whatever the law may be now, with respect to the sale of lands for taxes, we know that, at this early period, the claimant under a tax title was bound to prove that every requisition of the law had been strictly complied with. And without such proof, the deed itself furnished no evidence of title. Whatever may have been the case in Massachusetts, and other states of this Union, such was the course of decision in this state, and we are not at liberty to depart from it. This deed, then, although in evidence, could have no other legitimate effect than that for which it was admitted by the court, that is, to show the boundaries of Kennedy's possession. So far as respects title, it could prove nothing, and, of course, may be considered as out of the case.

The only interest which the lessors of the plaintiff acquired by their purchase under Carlisle's execution, was the interest of Kennedy, which was nothing more nor less than a naked possession. Of course, a prior possession was the only title upon which the plaintiff could claim to recover.

To defend against this, the defendant proved a recovery in ejectment of the premises on his own demise, in a case where the lessors of the present plaintiff were defendants; and that in pursuance of this recovery, he was put in possession by the sheriff of the county in virtue of a writ of *habere facias*.

This was all the evidence on either side, so far as title is concerned, and the court being of opinion that this recovery, connected with the taking possession under the writ of *habere facias*, was evidence of better right than the *mere* possession of the plaintiff, provided the premises in controversy were the lands thus recovered, so instructed the jury. And further, that if they believed the witness Campbell, who testified that the premises were a part of the identical lands thus recovered, they must return a verdict for the defendant. Were the court mistaken in this principle of law? Counsel seem to consider the opinion of the court as based upon the hypothesis that a recovery in ejectment is a law to a subsequent suit. But it is not so. We admit the principle that one recovery does not settle the rights of the parties. But in ejectment the party having the better legal title must succeed. It seems to the court that the mere naked possession does not fur-

nish as strong presumption of right, as does a recovery in ejectment, 155] followed by possession. In the one case there is *nothing but possession; in the other, possession, accompanied by the judgment of a court, that the party has a right of possession. In such case, then, there can be no pretense of ouster or disseizin. An entry under a writ of *habere facias*, issued upon a subsisting judgment, is a lawful entry; and it would be unjust that a person thus in possession should be disturbed by one who had no other claim than that of prior possession, especially when that prior possession had been held to be illegal in a trial between the identical parties. The question in this case is, whether the lessors of the plaintiff, showing only a prior naked possession, have better right than the defendant, who shows a recovery of the same premises in an action against these same lessors in a prior suit. It seems to us that they have not. The case of Johnson *v.* Rightmire, 16 Johns. 314, was, in one of its features, at least, similar to this. And the court decided that, "although a prior possession under claim of rights, and not voluntarily abandoned, will prevail in ejectment over a subsequent possession acquired by mere entry without any lawful right, yet where the subsequent possession of the defendant is acquired by a recovery and execution in ejectment, his entry is a lawful entry, and affords a better presumption of right than the prior possession, and the party who brings a second action of ejectment, after being ousted by a writ of *habere facias* possession, must produce additional evidence of title, and not rest upon his possession alone." There is this difference, however, between the case of Johnson *v.* Rightmire, and the case before the court. In that case the judgment was by default against the casual ejector—in this, a judgment upon trial. Still that court held that such a judgment furnished better presumption of right than a mere naked prior possession. If such be the law, and we take it to be, then there was no error in the instruction given to the jury.

3. The third reason assigned for a new trial is, that the verdict was against law and evidence.

If we are right as to that law, the verdict is strictly according to law; and, as to the evidence, it clearly sustained the verdict.

The motion for a new trial is overruled, and judgment will be entered for the defendant on the verdict.

Judge COLLETT dissented upon the first point.

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*LESSEE OF CADWALLADER WALLACE v. RICHARD SEYMOUR AND H. RENNICK. [156

By a sale of land for taxes in the Virginia military district, surveyed but not patented, the whole interest passes to the purchaser, and no right remains in the original holder. But, if such holder, to defeat the sale for taxes, is permitted to withdraw the survey and make a new one, upon which he obtains a patent, such patent is not void. The patentee holds the title subject to the rights that may have been acquired by the purchaser for taxes.

RESERVED in the county of Pickaway. This case was submitted to a jury at the last term of the court, in the county of Pickaway, and a verdict returned in favor of the plaintiff.

The lands in controversy are situated within the Virginia military district.

On the trial the plaintiff gave in evidence a patent from the United States, covering the land in controversy, and rested his case.

The defendants then offered to prove that the survey upon which the plaintiff's patent was based, was founded upon an entry in the name of Benjamin Holmes; that this entry had been previously surveyed, and the survey recorded in the name of Benjamin Holmes; that while the said last-mentioned survey subsisted, the survey and lands covered thereby had been legally sold for taxes to the defendant, Seymour, and a deed duly executed therefor; that after the sale and conveyance as aforesaid to Seymour, the heirs or representatives of B. Holmes caused "*error*" to be written on the recorded plat of the said previous survey, and withdrew the same, and caused a new survey to be made in their own names and recorded, which is the survey upon which the plaintiff's patent is based; and that the latter survey excludes two hundred acres of land included in the first survey.

This evidence was rejected by the court, and a verdict was returned for the plaintiff as before stated. Whereupon the defendants moved for a new trial on the ground that the court had improperly rejected the evidence by them offered.

LEONARD, DOUGLASS, and OLDS, in favor of the motion, insisted:

1. That since the act of Congress of March 2, 1807, a survey is

a sufficient defense in the action of ejectment, where the defendant is in possession under such survey. It is a good defense even against a patent granted on an entry made after the survey, and to support this position, they cited the case of Lessee of Anderson v. Clarke and Ellison, 1 Pet. 628.

2. That the patent to Wallace is void, not being issued in con-
157] formity to the act of Congress. The act of Congress, *Swan's Land Laws, 132, requires the production of the warrant, etc., and the survey executed agreeably to the laws of Virginia. This prerequisite was not complied with in the present case. The survey upon which the patent is based, is in contravention of the laws of that state, being made without any authority. By the sale for taxes, all the rights of Holmes, or his heirs, were vested in the purchaser. After this sale, there was no authority left in them to withdraw the survey, or to affect a new one.

3. The patent was fraudulently obtained for the purpose of defrauding the purchaser for taxes of his interest in the land.

On all these grounds they insisted that the evidence offered by the defendant should have been received, and inasmuch as it was not, therefore a new trial ought to be granted.

G. SWAN, contra:

Entries and surveys are only equitable estates, and as such can not be relied upon to support an ejectment or to defend in such action. 2 Wash. C. C. 33: 1 Marsh. 197, 440; 2 Bibb, 150; 4 Bibb, 554; 2 Ohio, 263; Tel Adams Eject. 32, note, 267; 1 Ohio, 313; Lit. Sel. Cas. 513; 2 Bibb, 129, 416; 3 Wheat. 212.

It may be affirmed, without fear of contradiction, that an ejectment has never been sustained upon an entry or survey; nor has it been attempted to subject lands thus situated to sale on judgment at law.

If the sale for taxes conferred any interest upon the purchaser, it conferred no greater interest than had previously been vested in Holmes, and this was a mere equitable interest, which can not at law avail against the legal title.

It is to be presumed that the first survey was properly withdrawn until the contrary is proven, and as the survey upon which the patent is based, was executed upon an entry made previous to 1807, the case is not within the proviso to the act of Congress of that year.

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Judge HITCHCOCK delivered the opinion of the court:

In the consideration of this motion, a variety of questions are presented of more than ordinary difficulty, in consequence of the nature of the titles in the Virginia military district, and the peculiar structure of our laws regulating the sales of land for taxes. By the introduction of his patent, the plaintiff *established [153 an apparent right to recover. And this right could only be defeated by showing a superior legal title, or by showing that the patent itself was inoperative to convey title. No attempt was made to show an older patent than that under which the plaintiff claims; of course, the defense relied upon does not depend upon a grant derived directly from the government of the United States, but upon the fact that the title of the plaintiff is invalid; in other words, that his patent is void.

It is claimed that this patent is void on the ground that the survey upon which it is based was made in contravention of the law of Congress of March 2, 1807. To determine this question, it becomes necessary to consider the effect of the sale for taxes, to prove which, the evidence rejected was intended. This sale we are bound to presume was in all respects in conformity to the law, and that the auditor's deed actually conveyed to the purchaser all the interest in the land which, under the circumstances, could by law be conveyed. The laws in force at the time provided that such deed should "convey to the purchaser all the right, title, and interest of the former proprietor in and to the land so sold." Before this sale for taxes, the "proprietor" of this survey was Benjamin Holmes, and at the time of sale, it was vested in him or his heirs—all the interest of Holmes and his heirs was, under the law then in force, vested in the purchaser. But as no grant had been made by the government, this was a mere equitable interest, as has been decided at the present term in the case of Lessee of Dresback and others *v.* McArthur. As it was a mere equitable interest, it could not at law avail the defendants against him having the legal title; and this disposes of the proposition of the defendants, that upon an entry and survey, ejectment may be sustained, or that the proprietor of such entry and survey may, upon the strength of his title, defend in ejectment.

At the time of this sale the legal title being in the government, had that title afterward been granted to Holmes, his heirs or assigns, upon the same survey, the case would have been similar

in principle to that of Stuart's Lessee *v.* Parish, 6 Ohio, 477, in which the court held that where lands had been sold for taxes before a patent issued, the legal title of the patentee would not be thereby affected. But although the effect of the auditor's deed is 159] only to convey an equity *where the former proprietor had no greater estate, yet this is only between the owner of the legal estate and the purchaser. The tax deed purports to convey a legal estate. It is made by authority of the state, and as to all the world, except him who has the legal interest, would convey a legal title. Further, should the former proprietor afterward obtain his patent, although vested with the legal title, he must hold it in trust for the purchaser at tax sales. There is a difference in sales for taxes and upon execution. Upon the latter, mere equities can not be sold, while express provision is made by statute for selling *any interest*, which a man may have in lands, for taxes.

A sale for taxes, vesting in the purchaser all the interest, whether legal or equitable, of the former proprietor, it follows, in the present case, where the hypothesis is that the sale was legal, that the interest of Holmes and his heirs was vested in the defendant, Seymour. And although, according to the law as we understand it, the proprietor of an entry and survey may withdraw the same and locate it on other unappropriated lands, yet when his ownership ceases, this power ceases. After the purchase of Seymour, neither Holmes, nor any person claiming under him, had any right to withdraw this survey because they had no interest therein, and Seymour would be protected against any subsequent locator in virtue of the act of 1807.

This act extends the time for making locations within the district for the term of three years, "Provided that no locations as aforesaid within the above-mentioned tract shall, after the passing of this act, be made on tracts of land for which patents had been previously issued, or which had been previously surveyed, and any which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered as null and void." Swan L. L. 134.

The object of this provision is to prevent new locations upon previous surveys—not to prevent the survey of previous locations. In the case before the court, the original location was made long before 1807. It was also surveyed before that date. An attempt has been made to withdraw this survey, and resurvey a part of

the same land on the original entry or location. And upon this resurvey the patent has emanated. *The case is not within [160 the letter of the proviso to the act, and we think it is not within its meaning.

It is objected that the withdrawal was without authority, and therefore that the survey upon which the patent is based is void, and if so the patent is also void. Upon this part of the case there certainly is much difficulty. As before stated, we consider that Seymour, after the purchase for taxes, was the owner of the survey as completely as Holmes was before, and of course the subsequent withdrawal was without authority. Still, we incline to the opinion that the patent is not void, as all the land granted by it is within the original survey, although it does not purport to be based on that survey. The legal title is gone from the government, and vested in Woldmer. Whether he holds it in trust for the defendants must depend upon such facts as may be disclosed in a proper case.

It has been further urged in support of the motion that, as the patent covers only six hundred out of the eight hundred acres originally surveyed, if this patent is held to be valid the defendants will be deprived of the two hundred acres not patented. It is not so. The survey as to the two hundred acres is still a subsisting survey, because, although an attempt has been made to withdraw, it is a void act, having been attempted by those who had no interest.

Another objection to this patent is, that it was obtained for the purpose of defrauding the purchaser for taxes. If the patent had been issued on the original survey, it would have been a valid instrument. Does the circumstance that the survey was changed alter the case? We think not. The object of this withdrawal was undoubtedly to evade the payment of the taxes, or rather to defeat the title of the purchaser for taxes, a measure which can never be sanctioned by this court. So far as an attempt to defeat this title can be considered fraudulent, a fraud was undoubtedly intended. But, notwithstanding this change of the survey, the patentee must hold the land subject to any claim which the defendants may have in consequence of their purchase at tax sale, and this claim will be sustained in the proper court upon a case made entitling them to relief.

Upon the whole, we are of opinion that the evidence offered

would not have availed the defendants in their defense, and it was therefore properly rejected.

The motion for a new trial is overruled.

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161] *HAMLIN'S LESSEE v. WM. BEVANS.

A decree for alimony, charged upon real estate, where the petition for divorce is in general terms, binds the estate only from its rendition, and must be postponed to judgments rendered while the petition for divorce was pending.

THIS cause was reserved in the county of Knox, and came before the court in bank on a motion, by the defendant, for a new trial.

The lessor of the plaintiff claimed title under Hannah Hollister, whose title was derived under a decree of the Supreme Court divorcing her from her husband, and assigning her the land in dispute for alimony. The defendant claimed under a sale on executions, upon judgments against the husband, Hollister. The facts were as follows:

On May 8, 1828, the petition for a divorce was filed and process issued, which was served on Hollister, June 10, 1828. The petition was in general terms, describing no lands, and containing no specific prayer for alimony. The decree of divorce and assignment of alimony was pronounced in September, 1829.

The title under which the defendant claimed is derived thus: At June term of the court of common pleas, 1828, and after the service of the process in the divorce case, a judgment was rendered, at law, against Hollister, for the payment of money, in a suit pending, before filing the petition for the divorce. At June term, 1829, a decree for the payment of money was rendered against Hollister in the common pleas. This suit, too, was commenced before the petition for divorce was filed. Executions were issued upon this judgment and this decree, and subsequently to the decree for alimony, was levied upon the land. A sale and conveyance was made by the sheriff.

The plaintiff having presented his title under the decree for

alimony, the defendant produced the record book to show the record of the deed from the sheriff, neither producing the original or other copy. The plaintiff objected, but the court admitted the record book. The plaintiff further objected that the deed was insufficient in not describing the character of the action in which the judgment was rendered, on which the execution issued. This objection was also overruled. The defendant having proved the confirmation of the sale by the sheriff, offered in evidence the judgments upon which the sales had been effected. They were objected to as not corresponding with the recitals in the deed, except the one rendered in June, 1828. This objection was also overruled, *and the court directed the jury to find a verdict for [162 the plaintiff, and they found accordingly.

The defendants moved for a new trial on the ground that the court erred in directing the jury to find for the plaintiff.

BROWN and DELANO, in support of the motion, argued that the commencement of the suit for divorce attached to the petition no interest in the property of the defendant. Though a *lis pendens*, it did not affect the right of the defendant to sell, or of strangers to purchase his property. Consequently, that a judgment duly rendered, before a decree for alimony was pronounced, attached as a lien upon real estate, and obtained a preference. They cited Murray & Winter *v.* Ballow and others, 1 Johns. Ch. 566; Green *v.* Slayter, 4 Ib. 38.

GODDARD, CONVERSE, and HALL, for the plaintiff:

A new trial ought not to be granted, because:

1. The court erred in admitting the recorder's book as evidence of the deed. The statute makes a copy, certified in a particular manner, evidence. A law so liable to abuse should never be extended beyond its letter. If a party, with the original deed in his pocket, will, for reasons best known to himself, withhold it, and rely upon testimony of an inferior degree, because the statute (unwisely) permits it, let him bring himself exactly within the terms of the law, whose aid he invokes. It is no answer to say that there is as much *reason* for admitting the record, as a copy of the record; there is no *reason* for admitting either until the non-production of the original is accounted for. We are thrown beyond the empire of reason into the regions of strict law.

2. It appears to us that the objections taken to the judgments offered should have been sustained, as also those to the deed itself, in omitting to set forth the kind of action, etc. As these, however, are mere questions of practice, which have, probably, been determined by the court upon the circuit in other cases, we will trouble the court with no remarks of ours.

3. The substantial question in the cause is, whether the title acquired by the decree of divorce is superior to that acquired by the purchaser under the judgments. We understood the counsel for 163] the defendant, on the trial in the county, *to rely mainly upon a principle allowed by him to exist, namely, that the doctrine of *lis pendens* could only be urged in a court of law. The contrary is, however, directly asserted in Burnet's Lessee v. Williams, 5 Ohio, 461.

It is conceded that if the petition for divorce had contained a description of the land and a prayer for alimony, the wife's title by the decree would have overreached a conveyance by the husband pending the petition—because the purchaser would then be chargeable with notice of the petition and its objects. But he is as much chargeable with that notice in this case, because of the universal practice to decree alimony to the wife upon a petition like the present. Not only is this the ordinary, it is the universal result of success on the part of the wife. If a divorce be granted on the prayer of the wife, alimony *always* follows, if the husband have property. Alimony out of the husband's estate being, then, one of the necessary consequences of a successful termination of the suit, a purchaser chargeable with constructive notice of the pendency of the suit is chargeable with the same notice of its necessary consequences.

But we are not contending with a *purchaser pendente lite*. The defendant is a purchaser subsequent to the acquisition of our title, and claiming only that the judgments under which he claims were rendered before the decree. There is, in our opinion, a vast difference between the two cases, the rights of him claiming a mere lien being far inferior to those of one claiming to be a *bona fide* purchaser, upon sufficient declaration. Our meaning may be illustrated by a familiar principle. The assignee of a promissory note, who takes it as a *purchaser* in the regular course of business, may recover of the maker, though there were no consideration for the note. But he who takes the same note merely as *security* for

a pre-existing debt, stands in no such favored situation. See Bay v. Codrington, 5 Johns. Ch. 54, and other cases.

Again, what is the lien of a judgment? A mere creation of the statute, which may be given or taken away at pleasure by the legislature. The same legislative authorities authorize the transfer of the title to land from the husband to the wife. The decree in this case was a conveyance, and in the form of a conveyance. No execution had been issued upon the judgments, no levy made, no appropriation of this particular land to the payment of the creditor. What is there inconsistent *with sound principles [164 in holding that the wife's lien carried out and effectuated by the conveyance authorized by one act of the legislature, is superior to the inchoate claim of the creditor authorized by another act of the legislature?

Judge COLLETT delivered the opinion of the court:

The main, principal question to be decided is, are the decree and judgment obtained against Hollister, pending the petition for divorce, preferable liens over the decree for alimony? Where the object of a suit, in law or in equity, is to recover specifically a described piece of real estate, the pendency of the suit is held to be notice to all the world of the claim, and a final judgment or decree in his favor overreaches intermediate purchases, that is, purchases made pending the suit. 5 Ohio, 462; 1 Johns. Ch. 566. So, if the suit be against a trustee, to affect his title to land as trustee, and a final decree be rendered to that effect, the land is bound from the service of process. We know of no cases going further than these.

This bill alleges no claim to any specific tract of land, nor does it ask alimony to be decreed by way of annuity upon the real estate of the husband, in general terms. The court make such decrees without specific prayers in the bill, charging the rents and profits of land with alimony. But no reason is perceived why such charge should operate as a lien, until the decree is pronounced fastening it upon a particular property.

The statute laws of the state give to judgments and decrees, for the payment of money, liens on real estate, according to established priorities. This is but a decree for the payment of money, and its priority must stand upon the general law. It is subsequent in date to one judgment and to a decree, upon which

the sale on legal process was effected. The preference is with those, consequently the defendant has the better title.

The exceptions to the documents offered by the defendant in evidence, and received by the court, are very imperfectly stated. They are technical in character, and may not, on another trial, touch the true merits. As the court erred on the principal question, we grant a new trial, the cost to abide the event of the suit.

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165] *ZANESVILLE CANAL AND MANUFACTURING COMPANY *v.* ADMINISTRATOR, WITH THE WILL ANNEXED, OF E. GRANGER, DECEASED, T. PIERCE, AND S. SCOVIL.

Representatives of a deceased party to a judgment, where there is a surviving party, can be proceeded against by *scire facias*, jointly with the survivor, although deceased was a surety only for the debt.

THIS cause was reserved in the county of Muskingum. It was a *scire facias*, reciting that, in the lifetime of E. Granger, the plaintiff recovered a joint judgment against Pierce, Granger, and Scovil which remained unsatisfied—reciting also the death of Granger, and the grant of administration to Goddard, and demanding that Goddard show cause why he should not be made a party to the judgment, and why execution should not issue against Goddard, as administrator, with Pierce as principal debtor. The defendants severed in their pleadings—Goddard pleaded that his testator was a security only in the original contract, and that, therefore, he was not liable to be charged jointly with the surviving principal. Pierce also pleaded that he was surety. To their pleas, the plaintiff demurred, upon which arose the question adjourned.

GODDARD, in support of the demurrer, insisted that, in case of a joint contract, if one of the parties die, the survivor only can be proceeded against, the executor or administrator of the deceased party being discharged from liability at law. 1 Chit. Pl. 39. A

judgment against two or more, is as a joint obligation or contract, where the suit, in which the judgment obtained, is a joint one.

If there be a judgment against two, and one dies, a *scire facias* lies against the other alone. Bac. Ab. Ex. G., 1.

If a surety in a joint obligation die, the principal surviving, no remedy can be had, in law or equity, against the personal representative of the deceased surety. 2 Wash. (Va.) 136; Weaver et al. v. Shyrock, Ex'r, 6 Serg. & Rawle.

C. C. CONVERSE, for the plaintiffs:

In England, the heir is the representative of the realty of the deceased defendant. In this state the executor or administrator is, *quoad* creditors, the representative of the *realty*, according to the decision of this court. Piatt v. St. Clair's Heirs, 6 Ohio, 237; *vide* sec. 29 of "act defining duties of executors, etc.," 29 Ohio Stat. 236.

The *scire facias* in this state, therefore, must issue *against [166 the executor or administrator, and can not be brought against the heirs. In the *scire facias* against heirs which *formerly* prevailed in this state, this court has decided that the writ must contain a description of the lands sought to be charged. The writ in the case before the court contains no such description, nor is it necessary that it should, being against the administrator. It is the *land* which descends to an heir that fixes his liability for the satisfaction of the judgment. In other words, it is the *land in his hands*, and *not himself as heir*, that is bound by the judgment. If *no land* descends to the heir, *no* judgment can be rendered against him. The writ against the heir must, therefore, show *something* in his hands to be charged, otherwise there is no grounds for a judgment against him. But it is otherwise with an administrator. He can not show that he has *no assets*. By our law, *plene administravit* is an immaterial plea. Abbot v. Cole, 5 Ohio, 87. It is not necessary to ascertain that there are *assets* in his hands, *before* judgment can be rendered against him as administrator, as it is *before* judgment can be rendered against the heir. It is not the fact that he has assets that fixes his liability, but that a debt or demand is due from the estate. Whether there be assets or not, the creditor is entitled to judgment against the administrator. The question as to assets comes up in another form, and at another time, when the creditor seeks satisfaction of his judgment already obtained. It is not

therefore, necessary to set forth the lands in the writ against an administrator.

But there is another, and, as we think, a better and more correct view of the case, which settles the first question presented by the demurrer. By section 69 of the practice act 29 Ohio, Stat. 71, it is provided "that if in any such suit or action" (*i. e.*, such as do not abate by the death of the parties), "there be two or more plaintiffs," "or defendants, and one or more of such plaintiffs or defendants, shall die before final judgment, such suit or action shall not thereby abate, but the cause of action shall survive to the surviving plaintiff or plaintiffs, and against the surviving defendant or defendants, and such death being suggested on the record, the suit, or action, shall proceed in the same manner as if such death had not happened." And the law in force when the original suit was brought contained the same provision. 2 Chase's Ohio Stat. 966, ch. 384, sec. 70. And by section 70 of the practice act, 29 Stat. 71, it is provided, "that after final judgment, the 167] *surviving plaintiff or plaintiffs may, by writ or writs of *scire facias*, cause the executor or administrator of any such deceased defendant or defendants to be made parties to said judgment." 2 Chase's Ohio Stat. 966, ch. 384, sec. 70. This provision gives a *scire facias* when the death of one of several defendants happens *after* commencement of suit and *before* final judgment. The plaintiff may have a *scire facias* under this provision of the statute when the death takes place, while his demand is matter *in pais*, and the subject of litigation. The reason and equity of the case require that the plaintiff should have *at least* the same remedy when death takes place *after* the matter *in pais* is reduced to matter of record, and the subject of dispute between the parties forever put at rest by the solemn judgment of the court. Will not the law furnish a special *scire facias* in analogy to that furnished after the *elegit* was given, although the statute does not give, expressly, such writ? The objection to the form of the execution on a judgment against some of the defendants in their own right, and others in their representative capacity, is put at rest by the recognition of such execution by the statute, when it gives it where the death happens *pendente lite*.

The second point raised by the demurrer is, does the fact that the deceased defendant was a surety in the judgment constitute a bar?

The relation of principal and surety ceases at law when judgment is rendered. After judgment, *all are principals.*

C. C. CONVERSE, for the plaintiffs:

Section 26 of the act regulating judgments and executions, 29 Ohio Stat. 108, continues this relation after judgment for *one* purpose *only;* that is, for the purpose of first exhausting the property of the principal for the satisfaction of the judgment, before that of the surety shall be taken. As to *all other* purposes the defendants *are principals.*

The fact pleaded existed before judgment, and was then no answer to the original action; and no fact which existed before the judgment can be pleaded to the *scire facias*, much less a fact which could not be pleaded in bar in the original suit. But it is said a court of chancery will give no relief when death of surety happens *after* judgment. This, however, is *not* a suit in chancery. But, in South Carolina, it is held, "Though a bond be a joint bond, the obligors are bound *in equity, so that on the death or [168 insolvency of one of them, the other and his representatives are liable." Smith et al. *v.* Martin et al., 4 Des. Equity, 148. This court has said "it would hesitate before it adopted the doctrine cited from 2 Was. 134; Hen *v.* Munf." Buell *v.* Cross, 4 Ohio, 330. Again, by reference to the charter of the plaintiffs, it will be seen that they are a *banking* company. 14 Ohio Stat. 298–300, secs. 7, 11, 13, 14. By the act in force at the time when the original suit was brought, it was enacted that if the bank should institute a separate action against drawer and indorser, no cost should be recovered; although the contract was a *several* contract by the common law. 2 Chase's Ohio Stat. 1135, ch. 482, sec. 8. This court has said, in reference to this provision of the statute, that "a court of chancery would probably be open to the complainants" (a banking company against the administrator of a deceased surety), "when they shall have exhausted their legal remedies, if a balance still remains due upon the judgment." Bank of Chillicothe *v.* Yoe, Adm'r of McKay, 4 Ohio, 125. The only operation, the fact that Granger, was a surety can have, is to authorize the court to direct the clerk to certify that fact on the record when the judgment is entered up.

Judge COLLETT delivered the opinion of the court:

At common law, when a judgment was rendered against two,

and one died before execution, the judgment was held to subsist as several against the survivor. No process was recognized to make the representatives of the deceased a party to the judgment. If the deceased was a surety, it was held that the defect in the law to charge him could not be aided in equity. Our legislature seem to have considered these rules of decision as not in accordance with justice. In this view they have made statutory provisions to supply the defects. By the practice act of 1816, it is provided that where there are two or more defendants and one or more die pending the action, it should proceed against the survivors; and if the cause of action survived against the representatives of the deceased, they might be made parties to a final judgment when obtained by *scire facias*. This provision has in substance been ever since continued in force. We believe it changes the common law rule as 169] well in respect to judgments *rendered as to suits pending. It gives full remedy at law and embraces as well the case of sureties as of principals. All may be made defendants in one joint process, which is a safe and convenient mode of proceeding, introduced by legislative provision to expedite the administration of justice.

Judgment for the plaintiffs.

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ZANESVILLE CANAL AND MANUFACTURING COMPANY *v.* GRANGER'S ADMINISTRATORS.

THIS cause was the same in the main question as the foregoing. Judgment for the plaintiffs.

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ARTHUR DUNN *v.* WILLIAM EVANS AND WIFE AND OTHERS.

One seized of an estate of inheritance dies, leaving neither father, brother, nor sister, nor descendants, but leaving a mother. His estate is cast upon his next of kin of the blood from which the estate came. The mother marries and has a child, the estate passes from the next of kin and vests in such child as heir of the half blood, under the Ohio law of descents.

Dunn v. Evans and Wife.

THIS is a suit in chancery, reserved in the county of Belmont. The plaintiff claiming to be the owner in fee of 3185-4116 parts of one hundred and forty-six acres of land, which he holds as tenant in common with the defendant, asks partition.

On April 3, 1830, Mariam Penn, owning the premises, conveyed them to Francis Penn, her son and only child, and died soon afterward. On September 6, 1830, Francis Penn died seized of the land, leaving his wife pregnant. James Francis Penn, the posthumous child, was born on January 18, 1831, inherited the lands in fee, subject to the dower of his mother, and died on January 20, 1831. The plaintiff holds the interests in part, of those who, at the death of James Francis Penn, the person last seized, were his nearest of kin, of the blood of Francis Penn, "the ancestor from whom the estate came," and upon whom the estate descended; and upon this title he seeks partition.

It is shown by plea, that after the death of James F. Penn, his mother intermarried with William Evans, to whom, on December 14, 1833, was born a son, Ather Evans; and the partition is resisted on the ground, that the subsequent birth of a brother of James F. Penn, although of the half blood, terminates the estate of those who inherited the land at his death.

*Judge LANE pronounced the opinion of the court: [170

The fourth clause of the statute of descents of 1824, then in force, 2 Chase's Stat. 1313, sec. 1, preferred the brothers and sisters of the intestate of the half blood to the next of kin to the intestate of the blood of the ancestor, from whom the estate descended, provided such next of kin were more remote from such ancestor than his brothers and sisters, or their representatives. So that in this case, if Ather Evans, the brother in the half blood of James F. Penn, had been living at the time of his death, the land would have descended to him.

And it makes no difference with the right of Ather Evans, that his birth occurred after the death of James F. Penn. Although lands descend to him who is heir at the intestate's death, by the operation of the feudal rule, that the freehold should not be in abeyance, this descent may be defeated at any time, by the birth of a nearer heir. Co. Lit. 2, 6; 3 Cruise's Dig. 230; 3 Wils. 516; 3 Atk. 203. To prevent the supposed evils of a shifting inheritance, in a case like this, the Virginia statute of descents requires

from the heir the capacity of taking at the intestate's death. Tucker's Blackstone, 1803, 2 Appendix, 12.

The plaintiff, in argument, claims the profits of the land, in the interval between the death of James F. Penn, and the birth of Ather Evans. His right to such profits seems well grounded, 5 Co. Lit. 11, 6, n. 4, and cases cited; but his bill is not adapted to such relief. His purchases of the land were at various times, some before and some after the birth of the present owner, and the plaintiff acquired no interest in them until his purchases. The settlement of these claims will require the taking of a very complicated account, to which all parties in interest must be made parties, and an entire new frame of bill is necessary for this purpose.

Bill dismissed, reserving all right to account, either in law or equity.

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171] *State of Ohio v. Executors of Thomas Worthington.

An alternative contract to pay money, or convey land, in a certain event, is not discharged by the death of the contractor rendering the conveyance of the land impracticable.

This was an action of assumpsit, reserved from the county of Ross.

The first and third counts of the plaintiff's declaration set out, in substance, that the decedent, on December 1, 1825, promised to the plaintiffs that provided the canal should pass though the town of Chillicothe, he would pay or convey to the commissioners of the fund, two thousand dollars in land, or in in-lots, of his addition to the said town, or in money, at his option, the money to be paid in three years, and the land at any time within six months after the line of canal passing through said town should be put under contract. They proceed to aver that the line of canal passing through said town was put under contract in 1829, of which the decedent had notice, yet neither the decedent in his lifetime, nor the defendants since his death, have paid or conveyed, etc.

The defendants crave oyer of the letters testamentary, by which they are appointed executors, and demur to these counts.

WORTHINGTON and DOUGLAS, for defendant.

LEONARD and SWAN, for plaintiffs.

Judge LANE pronounced the opinion of the court:

The oyer is irregular. It is of an instrument of which no profert is made, nor is it in the hands of the plaintiff, but of the demurrants; yet as the letters testamentary are carried upon the record, we have not declined considering the case as regularly disclosing the fact that the death of Worthington occurred in 1827.

In the cases in which we have heretofore decided upon these subscriptions (5 Ohio, 55; 4 Ohio, 142), we have held that the action is sustainable in the name of the state; that the contract is not without consideration nor void because the canal was not put under contract within three years from the date of the subscription, and that no averment of demand or of readiness to receive performance need be made. This disposes of the first six objections raised in the defendants' brief.

The defendants insist that the death of Worthington happening *before the time of performance discharges them from the [172 right of action on this contract; that since they can not convey the land, they hold themselves excused from paying the money, for they assert it to be sound law, that where a contract is in alternatives, one of which becomes impossible by the act of God, the obligor is released from the discharge of the other. The authority cited for this principle, 5 Ohio, 20, was a suit on a penal bond, conditioned that one Rumsford should settle lands on his proposed wife, or leave her a legacy by will, to which the defendants showed she died in the lifetime of Rumsford, so that he could not perform the last alternative, upon which the court held the bond was gone.

The decision above cited plainly depends on the principle of interpretation applicable to the *condition* of a penal bond. This is an element of the obligation, introduced for the benefit of the obligor, to dispense with a penalty; therefore, everything in it, ambiguous or equivocal, is to be taken in his case as proven. 1 Pow. Con. 397; 10 Mod. 268.

Not so with the words of obligation in a contract, bond, or covenant; *they* are interpreted most strongly against the obligor, for it is presumed that he used those most favorable to his interests, and all doubtful terms or ambiguous words are to be construed

against him. He who speaks should speak plainly, or the other party may explain to his own advantage. 1 Pow. Con. 396. In this the common agrees with the Roman law, ff. II. 14, and with the French code, Code Civil, III. 1162. The counsel for the defendants have erred in applying to the contract a principle of interpretation applicable to the condition only, by which the contract is avoided. The law exacts from the obligor the literal performance of his engagement, and its fulfillment is not dispensed with unless every alternative of its term becomes impossible. Admitting, then, for present purposes, that the executors can not convey land, we conceive the contract becomes a simple engagement to pay money. "*When several things are due under an alternative, the extinction of one does not extinguish the obligation.*" Poth. on Obligation. "*L' obligation alternative devient pure et simple, si l' une des choses promises perit, et ne peutetre livree, meme par la faute du debiteur.*" Code Civil, III. 1193. It would be indeed startling to the good sense of an honest man, if one who contracted to do one of two things need do neither if unable to do both.

173] *Demurrer overruled; case remanded to the county to try an issue offset.

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LESSEE OF CADWALLADER WALLACE *v.* NATHANIEL SAUNDERS.

An entry and survey in the name of A. Singleton, attorney in fact for C. Holmer, deceased, are both void, and can not be the foundation of a subsisting title.

RESERVED in Highland county. This case was submitted to the court upon the following agreed statement of fact:

It was agreed that the plaintiff's claim to the premises in question is based upon an entry for twenty-two hundred and fifty acres of land on Lee's creek, a branch of Rattlesnake fork of Paint creek, made on April 20, 1795, which entry is as follows:

"No. 2,519. Anthony Singleton, attorney in fact for Christian Holmer, deceased, enters twenty-two hundred and fifty acres of land, part of a military warrant, No. 2,744, on Lee's creek, a branch of the Rattlesnake fork of Paint creek, beginning at the west

corner of Hardin and Gray's survey, No. 1,836, thence 39 west 616 poles, thence south 73 west 514 poles, thence south 17 east 574 poles, thence north 73 east to the beginning."

This entry was surveyed by Nathaniel Massie, deputy surveyor, on April 30, 1795, purporting to be "surveyed for Anthony Singleton, attorney in fact for Christian Holmer, deceased," and the plat and certificate of survey returned and recorded in the office of Richard C. Anderson, principal surveyor, on May 15, 1795.

Said entry and survey was patented to Cadwallader Wallace by patent bearing date May 28, 1834, which patent is made a part of the agreed case. The granting part of the patent is as follows: "In consideration of military service performed by Christian Holmer, who was a major for three years to the United States in the Virginia line and continental establishment, and in pursuance of an act of Congress," etc., "there is granted by the United States to Cadwallader Wallace, assignee of John D. Munford, attorney in fact to Lucy H. Taylor, formerly Lucy H. Singleton, and Richard Singleton, the only children and heirs at law of Anthony Singleton, deceased, a certain tract of land," etc., describing in part the land in controversy.

*It was further agreed that the defendant's claim is based [174 on an entry made on September 14, 1818, of which the following is a copy:

"No. 9,669. Thomas M. Saunders and John W. Pope, assignees, enter four hundred acres of land on a part of a military warrant, No. 5,349, on Lee's creek, a branch of the Rattlesnake fork of Paint creek, beginning at a hickory, sycamore, and sugar tree, northeasterly corner to Richard C. Anderson's survey, No. 3,759, thence north 36¼ east 359 poles to the line of Levi Teagle's survey, No. 2,298; thence south 25½ east, and from the beginning south 25½ east with the line of Anderson's survey, so far that a line north 46½ east will include the quantity." Which entry was surveyed by Thomas M. Saunders, deputy surveyor, October 6, 1818, and returned to the principal surveyor's office and recorded November 25, 1818. This last entry and survey was patented to Pope and Saunders anterior to the date of the patent to Wallace.

It was a part of the agreed case that either party might introduce other competent testimony.

Under this latter clause the plaintiff introduced copies from the United States general land office of the original warrant to A.

Singleton, as attorney in fact to Holmer, deceased, bearing date March 9, 1784; of Singleton's entry and survey; of a power of attorney from Lucy H. Taylor and Richard Singleton, devisees of Anthony Singleton, deceased, to John D. Munford, constituting him their attorney and authorizing him to manage and dispose of their lands in Ohio, dated July 23, 1832; of a conveyance from Munford, as attorney as aforesaid, to Wallace of twenty-two hundred and fifty acres of land on the Singleton survey upon Lee's creek for the consideration of five hundred dollars, dated October 14, 1833; and a copy of an affidavit of Peyton Randolph, filed in the land office and bearing date September 11, 1822, by which is proved that at that time Lucy H. Taylor and Richard Singleton were the only heirs of Anthony Singleton, deceased; and also a copy of Anthony Singleton's will, dated July 6, 1795, and of the probate of the same.

If, when these agreed facts are in evidence, the law of the case is with the plaintiff, judgment is to be entered in his favor, otherwise judgment is to be entered for the defendant.

175] *J. Scott & Son, for plaintiff.

C. Hammond, for defendant.

Judge Hitchcock delivered the opinion of the court:

There is no controversy in this case but that the patent of the lessee of the plaintiff covers the same land that is covered by the patent under which the defendants claim, and as this latter patent is anterior in date, the legal title to the premises in controversy is in the defendants, unless their patent is void. That it is void is insisted by the plaintiff's counsel on the ground that it is in contravention of the proviso to section 1 of the act of Congress of March 2, 1807. By this it is provided that no locations shall after that date be made within the Virginia military district, "on tracts of lands for which entries have been previously surveyed," and it is declared that any patents issued contrary to these provisions "shall be considered null and void." Swan's L. L. 134.

The lands patented to Pope and Saunders had been surveyed for Singleton previous to any entry made by them; of course under this law their patent is void if Singleton's survey is within its meaning. It becomes necessary, therefore, to ascertain the

object, intent, and meaning of this law. To those acquainted with the subject it is well known that before the passage of this act it was not unfrequently the case that entries were made upon lands which had been previously not only surveyed, but patented. These subsequent locations were sustained if there was any error or irregularity in those which had been previously made. That there should be errors and irregularities is not surprising, when we consider the state of the country when those locations and surveys were made. It was a wilderness far distant from the habitations of civilized man. But it was not without inhabitants. The western Indians claimed it as their own, and to protect their real or imaginary rights waged a war of extermination against those who attempted to interfere with those rights. In the times of these wars, and in constant fears of Indian warriors, were many, indeed, most of the early locations made. Under such circumstances it would seem to be next to impossible but that there should have been errors and mistakes. But when peace returned, when the country became better known, locations could be made with greater precision *and surveys executed with more ac- [176 curacy. Locators and surveyors, regardless of the claims of those who owned defective surveys, and who, relying upon the supposed strength of their title, had expended much both of labor and money in reducing the wilderness to a cultivated country, were constantly in the habit of making new entries upon these defective locations, and grasping to themselves the lands included therein, made more valuable by honest industry. The necessary consequence was almost perpetual litigation, and a want of confidence and great uncertainty in the titles. To remedy these evils, the proviso to the act of March 2, 1807, was introduced. It was intended to preserve "the peace and quiet of the inhabitants by securing titles previously acquired." It was intended to protect such surveys as were defective and "which might be avoided for irregularity." 1 Peters, 628. But it could not have been intended, as we apprehend, for the protection of such surveys as were absolutely void, or, in other words, such surveys as could not at any time after they were made be, consistently with law, carried into grants.

The land between the Scioto and Little Miami rivers was set apart to satisfy claims for military services, due to the officers and soldiers of the Virginia line on continental establishment, and

could not with propriety be appropriated to any other purpose, until those claims were satisfied; and no part of it was withdrawn from its liability to be surveyed for military warrants prior to the act of Congress of June 26, 1812. 9 Wheat. 469; 2 Peters, 417. By this act the line usually denominated Ludlow's line was provisionally established as the western boundary of the reserve (Swan's L. L. 137), and since that period no locations of military land thereafter located west of that line have been held valid.

If any of these lands have been surveyed for any other purpose than to satisfy military warrants granted by the State of Virginia for military services, in the Virginia line or continental establishment, such surveys would not be within the meaning of the act of March 3, 1807. In the case of Doddridge *v.* Thompson, 9 Wheat. 469, the entry under which the plaintiff claimed had been made subsequent to the passage of the act upon lands which had been long before surveyed under the direction of the surveyor-general of the United States; still the defendants were not pro-
177] tected by these surveys. The *same state of facts existed in the case of Reynolds *v.* McArthur, 2 Peters, 469, and the result was the same. It is true that in those cases this question does not appear to have been directly made, but had those previous surveys been within the law, it would have furnished a complete and adequate defense. In the case of Miller and others *v.* Kerr and others, 7 Wheat. 1, the Supreme Court of the United States decided that "where the register of the land office in Virginia had by mistake given a warrant for military services in the continental line, on a certificate authorizing a warrant for services in the state line, and in recording it pursued the certificate and not the warrant, the court could not support a prior entry and survey thus issued by mistake against a senior patent."

In the case of Lindley and other *v.* Lessee of Miller, 6 Peters, 666, the same court say, at page 675, in making the cession, Virginia only reserved the right of satisfying warrants "issued for military services in the state line, on the continental establishment. Warrants of no other description, therefore, could give any right to the holder to any land in this district." Again, at page 676, "to cure defects in entries and surveys, was the design of the act of 1807. It was intended to sanction irregularities, which had occurred without fraud, in the pursuit of a *valid title*. In the pas-

sage of this act, Congress could have had no reference but to such titles as were embraced within the deed of cession." And again, at page 678, "there can be no doubt but that Congress did intend to protect surveys which had been irregularly made, and it is equally clear they did not design to sanction *void* surveys. A survey is void unless made under the authority of a warrant."

In the opinion of this court, a survey to be protected under the proviso to the act of March, 1807, must be such as has been made in good faith, under the authority of a warrant for military services in the Virginia line on continental establishment, and it must be, at the time of the subsequent location, a subsisting survey.

Is the survey, under which the plaintiff claims and in virtue of which he seeks to defeat the title of the defendants, of this description? It is not a little extraordinary that if this survey was legally made, "in pursuit of a valid title," no patent should have been issued for the period of thirty-nine years, especially when we take into consideration the fact that, *as early as 1822, [178 at least, there was evidence in the land office that the grantors of the plaintiff's lessor were the sole surviving heirs of Anthony Singleton. This evidence must have been filed for some purpose, and unless that purpose was to procure a patent, it is impossible to conjecture what it might have been. Still no patent is issued for twelve years thereafter. It is equally extraordinary that the lessor of the plaintiff, if he considered the survey a good and subsisting survey, should in the year 1834 have paid but the trifling sum of five hundred dollars for twenty-two hundred and fifty acres of land, on Lee's creek, in the county of Highland. But, although these circumstances may satisfy our minds that the survey was considered of doubtful validity, still they do not prove it to have been void.

The entry upon which the survey is based, was made in 1795, and purports to have been made by "Anthony Singleton, attorney in fact for Christian Holmer, *deceased*." It was surveyed for Anthony Singleton, "attorney in fact for Christian Holmer, deceased."

The question which here arises is, for whom was this survey made, or rather in whom was the title, so far as title is confirmed by survey? The services for which the warrant issued were performed by Christian Holmer, and he, his heirs or assigns, were,

according to the laws of Virginia, entitled to the bounty. But as an entry and survey made in his name or for his benefit, it could be of no effect. It was made by his attorney in fact, after his own death. It can not be doubted that as a general rule the authority of the attorney ceases upon the death of the principal. If, then, after the death of the principal, the attorney makes an entry, it is done without authority, and of course void. Further, in the case of Galt and others *v.* Galloway and others, 4 Peters, 345, the court say, "an entry made in the name of a dead man is void." And the same point was expressly decided in the case of McDonald's Heirs *v.* Smalley and others, 6 Peters, 261; as a survey, then, in the name of Holmer, or for his use and benefit, this survey is utterly void.

If this is considered as a survey in the name of Singleton, or for his use and benefit, then the question arises whether he had any right to make the entry. The warrant itself shows, the whole case shows, that he has performed no services to entitle himself to a bounty in lands under the laws of Virginia.

179] *The warrant, it is true, purports to be issued in consideration of services rendered in the Virginia line on continental establishment. But these services were performed by Holmer, not by Singleton. The law of Virginia authorizes a warrant to issue to the party performing the services, "his heirs or assigns." Swan's L. L. 112. Singleton claimed no right either as "*heir or assignee.*" He was merely attorney in fact. The warrant upon its face shows that it was issued to one having no right to receive it. In our opinion a survey made under such a warrant is not within the meaning of the act of 1807. It is not such a survey as will render void a patent based upon an entry subsequent to its date. It is in fact void, having been made for a person who had not the shadow of right to claim lands within the district.

What the effect would have been had a patent been issued upon this survey of an earlier date than the patent of the defendant, it is unnecessary to determine. As the case is now situated, we have no hesitation in saying that judgment must be entered for the defendants.

## Washington Garver et al. v. Wm. Morgan.

*Feme sole*, one of several plaintiffs, marries pending the suit, good plea in abatement.

Reserved in the county of Columbiana.

This is an action on the case for a nuisance. It was originally tried in the court of common pleas, and removed to this court by appeal.

At the October term of this court in the county of Columbiana, 1835, the defendant filed a plea, verified by affidavit, that since the last continuance, "to wit, on February 12, 1835, Matilda Garver, one of the plaintiffs, intermarried with one Robert L. Flemming, and that the said Matilda is still under the coverture of the said Robert L. Flemming," and concluding in abatement.

To this plea the plaintiffs demur.

Loomis & Metcalf, for the plaintiffs, submitted no argument.

*Wm. D. Ewing, for the defendant, cited the following au- [180
thorities: 10 Mass. 180, 181; Gil. Hist. & Prac. C. C. 254; 17 Mass. 341; 7 Pick. 62–64; Bac. Abr., Abatement, L.; Com. Dig., Abatement, E. 2; Ib., E. 7; Ib., H. 42; 1 Chit. Pl. 22, 437, 438; 6 Term, 265; 4 East, 502; Arch. Civil Pl. 302, 345; Gilmer, 145.

Judge Hitchcock delivered the opinion of the court:

It is well settled that when a *feme sole* plaintiff marries, after the commencement and during the pendency of the suit, it may be pleaded in abatement.

That the same principle applies where there are two or more plaintiffs in the same case, and one of them intermarries, is shown by the following authorities: 10 Mass. 179; 17 Mass. 341; 7 Pick. 62.

The demurrer is overruled.

## Charles Fight v. The State.

Where pending a trial upon a criminal prosecution, the accused, being on bail, absconds, it is legal to proceed with the case, and to receive a verdict of guilty in his absence.

An indictment charging that the defendant uttered, in payment, counterfeit coins, "made and counterfeited to the likeness and similitude of the good, true, and current money and silver coin, currently passing in this state, called 'Spanish dollars,' is good," but must be sustained by proof.

The writ of error in this case was made returnable to the court in bank. The facts, as they appear in the record, are these: The grand jury of the county of Brown, at the August term of the court of common pleas, 1834, returned a bill of indictment against the plaintiff, for uttering counterfeit coin, currently passing in this state, called Spanish dollars, knowing it to be counterfeit. The plaintiff was arraigned at the same term, plead not guilty, and on his motion, and giving security, the prosecution was continued. On the fourth day of the succeeding November term the plaintiff was placed on his trial before the jury, and the testimony being partly heard, the court adjourned until the next morning, November 5th, at which time the court again met, and the prosecuting attorney appeared in behalf of the state, but the plaintiff being called made default. The court then, on motion, issued a bench warrant for the plaintiff, and proceeded to charge the jury. The jury retired, and on the next day, November 6th, came into court with a verdict of guilty, which was received by the court *in the absence of* Fight. At the March term, 1835, Fight appeared in court and moved for a new trial, and assigned the following as reasons:

181] *1. That the proceedings had, on the trial, at the last term, were irregular and contrary to law. 2. The verdict was contrary to law and evidence, and should have been for the said Charles Fight, and not against him. 3. The jury heard only a part of the testimony. 4. The verdict was brought into court in the absence of said Charles Fight. 5. The said Charles Fight was three times called to come into court, but made default, and his recognizance was forfeited. 6. After the forfeiture of the recognizance, and when the said Charles Fight was absent, the jury

brought in their verdict against him. The court overruled this motion, and Fight then moved in arrest of judgment, and assigned the following reasons:

1. It appears the court, after having heard a part of the testimony, on the trial of the case, adjourned without making any disposition of the jury. 2. That the third count in the indictment is insufficient, because it charges the coin attempted to be passed to be in the likeness and similitude of *Spanish dollars*, which are not current coin in this state. Several other points were made in this motion, but, like the first, do not present objections to the proceedings appearing on the record, and are not deemed necessary to be again stated. The court overruled this motion in arrest of judgment, and sentenced the plaintiff to imprisonment in the penitentiary for three years.

MORRIS, for the plaintiff in error.

JOLLIFFE, prosecuting attorney, for the state.

Opinion of the court, by Judge WOOD:

The plaintiff seeks to reverse the decision and judgment of the court of common pleas, and has assigned for error, its opinions on both the motions for a new trial, and in arrest. *Did the court of common pleas err?* We have endeavored to consider the case with that deliberation a due regard to the rights of the plaintiff required of us; and if our investigation had led us to doubt the correctness of the proceedings of the common pleas, it would be no less our pleasure than our duty to give him the full benefit of such doubts. No man should be brought within the energies of the criminal law, and subjected to its penalties, but upon full and deliberate *conviction that he has violated its principles, [182 but when such conviction is forced on the mind, it is to be borne in recollection that the community has its claims, and while *innocence* should be protected, *guilt* should be certain to receive its reward. The record is prolix. It shows that every point was contested with much zeal and perseverance before the court of common pleas. We have reviewed the whole case, and it appears to us there are but *two* questions arising on the record to be determined worthy of a moment's consideration; and they, only, will be noticed. 1. Where a prisoner is let to bail, put on his trial and

absconds during its progress, is it error to proceed with the trial, and receive the verdict *in his absence?* 2. Is the description of the counterfeit coin, as "*Spanish dollars*," sufficient?

In England, in misdemeanors, where the defendant is on bail, a trial, conviction, and sentence may be had in his absence. He is present or not, at his option. In felonies, a different rule, it is true, prevails. The accused must be present, when every principle of the law is discussed and determined in which he is concerned. The reason of this difference in the mode of proceeding in the two cases can not, perhaps, at this time, be satisfactorily ascertained; or rather, no satisfactory reason can be given for it. A prisoner, in close custody, may be so easily oppressed and deprived of his rights, and it would be so extremely difficult for him to make known his injuries, and obtain redress, that to prevent unnecessary restraint, and to afford the accused an opportunity of being fully and fairly heard, the rule in reference to *him* may be reasonable and salutary; but it would apply with force to all classes of offenders. But in felony, the accused is not necessarily confined within the four walls of the prison. Both before and after the conquest, all felonies were bailable by the ancient common law. (Stat. Westm. 1 and 3 Edward I., c. 15; 23 Henry VIII., c. 9, and 1 and 2 Phil. and Mary, c. 13), except treason, murder, and certain other crimes from those for which the king's justices may bail. 4 Bl. Com. 268. But the court of king's bench, or any judge thereof in vacation, may, at their discretion, admit persons to bail, *in all cases whatsoever*, 3 East, 163; 5 Johns. 169; but none can claim this benefit *de jure*, 2 Hale, 129. If on bail, I apprehend, neither the courts in Great Britain, nor the United States, would proceed to impanel a jury, in a trial for
183] felony, *unless the accused were present, to look to his challenges. If the trial, however, is once commenced, and the prisoner in his own wrong *leaves the court, abandons his case to the management of counsel and runs away*, I can find no adjudged case to sustain the position, that, in England, the proceedings would be stayed. Such a case must form an exception to the general rule, and the verdict may be legally received *in the absence of the accused.* The prisoner can not be deprived of his right to be present at all the stages of his trial; but that he *must* be, under all circumstances, or the proceedings will be erroneous, can not, we think, be sustained.

2. *Is the indictment sufficient?* The statute on which this indictment is framed, is section 28 of "an act for the punishment of crimes." It reads thus, "that if any person shall counterfeit any of the coins of gold, silver, or copper, currently passed in this state, or shall utter or put off any such counterfeit coin or coins, knowing them to be such," etc. The words of the indictment are, "that the said Charles Fight," etc., "four pieces of false and counterfeit money and coin, made and counterfeited to the likeness and similitude of the good, true, and current money and silver coin, currently passing in this state, called *Spanish dollars*," etc., "did utter and tender in payment," etc., "and put off." The plaintiff objects to this averment, because the coin is called *Spanish dollars*, which he contends are not money current in this state. This, in our view, was a fact exclusively for the jury, whether there was such coin as is called *Spanish dollars*, and whether it was currently passed in this state; and the jury having found these facts, it is far from our duty to disturb the decision of the court of common pleas, in refusing to grant a new trial, especially in the absence of the testimony on which that court acted, and which is not contained in the record; and it surely forms no ground for reversing the decision of that court for refusing to sustain the motion in arrest. Judgment affirmed.

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*SAMUEL STRADER *v.* HEIRS OF OTWAY BYRD ET AL. [184

A decree upon a bill of review can not be again reviewed in a second bill of review.

RESERVED in the county of Highland. This is a bill of review, seeking to reverse a decree of this court made at the June term, 1831, in Highland county.

The facts of the case, as they appear upon the record, and so far as it is necessary here to state them, are as follows: The original bill was filed in the court of common pleas of Highland county, at the June term of that court, 1816, and the necessary steps taken to bring the defendants before the court. The cause was

continued from term to term, until the March term, 1822, when, upon final hearing, the bill was dismissed. Notice of an appeal was given by the complainant, but the appeal was never perfected. At the November term of the court of common pleas, 1825, a bill of review was filed by the complainant, to which the defendants demurred, and at the October term, 1826, the demurrer was overruled, the former decree reversed, and the case continued for hearing upon the merits, according to the practice in this state.

At the April term, 1828, the case came on for hearing, and a decree was rendered for the complainant. From this decree, the defendant appealed to the Supreme Court, where the cause was continued until the June term, 1831, when, upon hearing, the demurrer was sustained and the bill dismissed at complainant's costs.

To reverse this decree of dismissal, the present bill of review is brought and filed on June 10, 1834.

The defendants, who have answered, insist, among other things, that the cause was originally tried upon its merits in the court of common pleas, and the original bill dismissed. That afterward a bill of review was filed in that court to which the defendants demurred, and, on hearing, the demurrer was overruled, the original decree reversed, and the case set down for hearing on the merits, and, upon hearing, a decree was pronounced in favor of the complainant, from which the defendants appealed to the Supreme Court. That, on hearing, in the last-named court, the demurrer was sustained and the bill dismissed.

T. and W. Scott, for complainants, insisted that the statute of Ohio, allowing bills of review, was framed with reference to the 185] chancery practice in this state, and not with reference *to the practice of the high court of chancery in England. In England the facts upon which the decree is based are embodied in the decree. On this account, errors in law must be confined to the decree, while, by the practice in Ohio, errors apparent in any part of the proceedings may be assigned as well as errors in the decree. In order to avail themselves of the original decree, the defendants should have pleaded that decree in bar to the review, and should have demurred merely to opening up the enrollment. By demurring to the bill of review, the whole case was opened.

They further urged that inasmuch as the object of this bill was

to reverse a decision of this court, it was not a second bill of review after demurrer to a former bill of review allowed. That the defendants, in order to avail themselves of this defense, should have appealed from the order of reversal made in the court of common pleas. But they did not appeal from that order. They waited until a final decree was made upon the merits, and from that appealed. They cited 2 Ball & B. 150; 1 Atk. 291.

They also submitted an argument upon the merits of the case, but it is unnecessary to mention it.

G. COLLINGS, for the defendants, insisted that the rule in England is well established, that a bill of review would not be entertained after demurrer to a former bill of review allowed. That although the practice in this state upon bills of this description is different from the practice in the high court of chancery in England, yet the spirit and reason of the rule would apply as well in this country as in that. The reason of the rule is, that an end may be put to litigation. After two concurrent decrees it is time litigation should be stayed.

He further insisted that the defendants could not have appealed from the decree of reversal in the court of common pleas, because that was not a final decree, the cause being continued in that court for further hearing. But when appealed, the first duty of the appellate court was to decide the question upon demurrer, upon which question, according to the practice adopted, the whole case would be examined. He cited 2 Ohio, 381; 3 Ohio, 354, secs. 55, 58, of Chan. Prac. Act; 19 Johns. 443; 17 Johns. 548.

*Judge HITCHCOCK delivered the opinion of the court: [186

The first question, and the only one presented in this case which it is necessary to consider, is whether a decree made in a bill of review can afterward be re-examined by a subsequent bill of review. Although this question is not presented by plea, it is done by answer; and in the case of White *v.* Bank of the United States, 6 Ohio, 588, it was held that any defense which can be made by plea may be made by answer. This question is a new one, so far as relates to practice in this state. We have never known a case where an attempt has been made to sustain a second bill of review, nor have we known one in which such bill has been filed.

Section 3 of the act directing the mode of proceeding in chan-

cery, 29 Ohio L. 81, directs that the courts "shall, in all things, be governed by the known usages of courts of equity, except when it may be otherwise provided by law. We have been anxious to ascertain the usages of courts of equity upon this subject, but counsel have referred to few authorities. Indeed, none have been cited bearing directly upon the point. In 2 Maddox Chancery, 451, it is said: "A bill of review does not lie after a demurrer to a former bill of review allowed." And again, on the same page: "If upon bill of review a decree has been reversed, another bill of review may be brought upon the decree of reversal." To sustain this latter dictum, Mitford's Chancery Pleadings, 66, in note, is cited. In Cooper's Equity, page 92, it is said: "And a bill of review may be brought after a bill of review already filed, as if upon a bill of review a decree has been reversed, another bill of review may be brought upon the decree of reversal," and 2 Chancery Precedents, 633, is cited. And this latter work we take to be the authority upon which the dicta to the same effect in Maddox and Mitford are founded. This work is not within our reach, and we have not been able to examine it. In the case of Barben *v.* Searle, 1 Vern. 407, Sergeant Maynard stated in argument, "that bills of review are not favored, and are tied up to strict rules," and for authority cited the case of Dunny *v.* Filmere, where, as he said: "Upon bill of review the court had decreed the whole estate to the plaintiff, and though it appeared from the face of the decree that the plaintiff had title to one moiety only, there it was resolved that no bill of review would lie upon a bill 187] of review; and the defendant was left without *remedy." This, it is true, is merely the statement of counsel, but it is not controverted by the chancellor. Upon the examination of the case of Dunny *v.* Filmere, 1 Vern. 135, it will be found that the point decided was that "a bill of review was not, after a demurrer to a former bill of review, allowed." The same point was decided in Pitt *v.* Earl of Anglus, 1 Vern. 441. From these authorities there would, upon slight examination, seem to be some uncertainty respecting the question under examination, and perhaps some apparent contradiction in the cases. But it is believed there is none in reality, and that from the whole this rule of practice may be extracted: When a demurrer to a bill of review has been sustained or allowed, in other words, where, according to our practice, the bill has been dismissed, and the original decree

thereby affirmed, no subsequent bill of review will lie; but where the original decree has been reversed, this decree of reversal may be reviewed, and this is believed to be "according to the common usages of courts of equity" in England. This rule of practice is based upon sound reason. Where there have been two concurrent decrees, as in the case of the demurrer allowed, it is time that the litigation should be ended, but where the original decree has been reversed there the matter of equity may still be considered as doubtful.

It is urged, however, that although this may be the practice in the high court of chancery in England, still that it ought not to prevail here, inasmuch as our practice upon bills of review is, in other respects, different from the practice of that court. An examination of our statute regulating the practice in chancery would not lead us to this conclusion. It merely provides that petitions for review may be filed within five years from the entry of the original decree. It is not in virtue of this clause of the statute alone that bills of review are allowed. It was intended rather as a limitation of the time within which they might be filed. In England they may be brought at any time within twenty years from the entry of the decree (Crabb's Eq. Pl. 92); in this state at any time within five years. In both countries the limitation of time within which writs of error may be brought at law and bills of review in chancery is the same, although in England, so far as bills of review are concerned, it is by analogy to the act of parliament fixing the time within which writs of error *shall be brought, while in Ohio it is by express [188 enactment. What practice has been adopted under this statute which would lead us to depart from the "known usages of courts of equity" in England? In that country we know all the facts upon which the final order of the court is made are embodied in the decree. Of course, upon the bill of review the court look only to the decree, and if that be reversed it is for errors therein apparent. In this state it is not customory to embody the facts upon which the opinion of the court is based in the decree, but all the evidence taken is a part of the case. It is on file, and many times is made a part of the record. The statute requires that a complete record shall be made of the proceedings, and by our system a court of chancery is as much a court of record as is a court of law. Inasmuch, then, as the decree itself, according to the

practice adopted, is merely the consideration of the court upon the equity of the case, arising from all the facts and circumstances taken in connection with the pleadings, it has been found necessary, in order to give effect to the bill of review, to look into all the facts and circumstances, the process, pleadings, and proceedings, as well as into the decree. And if upon the whole matter it is ascertained that there is error, then the original decree is reversed, otherwise it is affirmed. But does this course of practice interfere with the English rule that after demurrer allowed to one bill of review, a subsequent bill of review can not be sustained? It is believed that it does not. That rule is predicated upon the reason that where there have been two concurrent decrees, there should be an end to litigation. Adopt a different principle and there will be no end. The case before the court has been depending in one shape or another for more than nineteen years, and if the principle contended for by the complainant's counsel be correct, there is no prospect of its termination. The mistake of counsel seems to be as to the effect of demurrer to the bill of review. That demurrer admits all the facts well pleaded, but in deciding it the court look into all the facts upon which the original decree was predicated, as was held in the case of Heirs of Ludlow *v.* Kidd's Heirs and others, 2 Ohio, 381, and upon the whole case determine whether there is or is not error. If there is no error the bill is dismissed, and thereby the original decree is affirmed. So that we have two concurrent decrees, as is 189] the case according to the English practice, where *a demurrer is allowed to a bill of review. If this rule is founded upon good reasons, and we think it is, it is of equal force in this state as in any other country; and we have come to the conclusion that where the original decree has been affirmed on bill of review, no subsequent bill of review can be allowed.

It may perhaps be thought that this determination would lead to the conclusion that a decree of this court, made on appeal, and where the decree was the same as that which had been made in the court of common pleas, could not afterward be reviewed. But it is not so. By the appeal, the decree of the common pleas is vacated. The case stands as if no decree had ever been made. This court consider it as an original case, and there can not be the two concurrent decrees until there has been a review and affirmance of the decree which this court shall originally have made.

Counsel for the complainant further insists, that admitting the foregoing principles to be correct, still that this case can not be considered in the light of a bill of review after demurrer to a former bill of review allowed, because there has been but one decree in this court, and the object is to reverse that decree.

What are the circumstances of the case? In 1822 a decree was made in the court of common pleas, in the original case. From this decree there was no appeal. Although notice was given, the appeal was never perfected. It is, then, a subsisting decree, of precisely the same binding force as if made in this court. Originally it might have been vacated by appeal, now it can not be done unless by review. For the purpose of reviewing this decree, a bill was filed in the court where the decree was entered in 1825. To this bill of review there was a demurrer, and upon hearing the original decree was reversed. When reversed, the case was continued for further hearing, and upon such hearing a final decree was entered for the complainant. Thereby, if there had been no further proceedings, the original decree would have been vacated. But the defendants were not satisfied with the decision of the common pleas, and appealed to this court. The effect of this appeal was to vacate all the orders and decrees of the common pleas on the bill of review, and to reinstate the original decree of that court. Counsel for defendant seem to suppose that this appeal brought up the original case as an original *case. But it is not so. That [190 had been decided six years before, and could not be appealed unless it was done within thirty days after the close of the term in which the decree was entered. If the position of the complainants counsel was well taken, it would be in the power of a party to a proceeding in chancery to evade, in a great measure, the law regulating appeals. If he failed to prosecute an appeal from the original decree, he would have nothing more to do than to file a bill of review, and when that was decided, to sue an appeal, and thereby present the case to the appellate court as upon the original bill. Such practice will not be sanctioned by this court.

By the appeal, the bill of review and proceeding under it were brought to this court and not the original case, any further than it was connected with this bill. It was by this court to be considered exactly in the same manner as if it had originated here, for the purpose of reviewing one of its own decrees. It was so treated. This court, it is true, according to its practice, examined the origi-

nal case, but not as an original case, but as part and parcel of the bill of review. Upon such an examination the court being of opinion that the original decree was in accordance with the equity of the case, dismissed the bill, thereby affirming the original decree. It is manifest, from all these facts, that the present case is nothing more nor less than a bill of review, after demurrer to a former bill of review allowed. There are two subsisting concurrent decrees, and "according to the usages of courts of equity," this bill can not be sustained, but must be dismissed.

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BENJAMIN TAPPAN *v.* JAMES WILSON.

Terms of general abuse, when printed and published, are not libelous.

THE plaintiff, in his declaration, states, in substance, that he was one of the judges of the United States court for the district of Ohio, duly appointed by the President of the United States, to hold his office until the end of the next session of Congress, which was on the 30th day of June, then last passed; and whereas, it was expected and believed that the said Benjamin would be nominated by the President of the United States, to the senate of the United 191] States, for *confirmation in his said office, and that the advice and consent of the senate would be asked to the making of said appointment; yet the said James, well knowing the premises, etc., and to cause it to be suspected and believed, etc., that said Tappan, while he was one of the judges of the United States court, as aforesaid, was the editor of a party newspaper, and was the author of filthy and abusive articles in a newspaper printed in Steubenville in said county, and was a purse-proud aristocrat, and was anxious to put down the Bank of the United States to promote his own pecuniary interest thereby, and to cause it to be believed, that he, the said Benjamin, was the author of violent abuse of his fellow-citizens, the real democracy of the country, and that he was desirous of increasing his income by oppressing the farmers and mechanics and lowering their prices; and to cause it to be supposed and believed that the said Benjamin did libel the char-

acters of members of the said United States Senate, with the intent to influence and induce the said senate to withhold their advice and consent to the appointment of the said Benjamin to the office aforesaid, and thereby to injure the said Benjamin in his said character, office, and standing, did, theretofore, to wit: on the 19th day of March, in the year of our Lord 1834, at Steubenville, in said county, falsely, wickedly, and maliciously compose and publish, and cause and procure to be published, of and concerning the said Benjamin, a certain false, scandalous, malicious, and defamatory libel, in one part of which there was, and is, contained the false, scandalous, malicious, defamatory, and libelous matter following, of and concerning the said Benjamin, that is to say: "Mr. Editor Tappan, being a purse-proud aristocrat, and having a large amount of money in stocks, in several of the Ohio banks, is anxious to put down the United States Bank, so that his stock may become more profitable to him than it is at present. Tappan well knows that if the United States Bank notes are withdrawn from circulation, the notes of the local banks will be substituted, greatly to *his* profit. This is *his* democracy. He is not contented with ten or twelve per cent. upon his money, but wants fifteen or twenty. This is the true cause of his violent abuse in his *mud machine* (meaning the American Union, a newspaper printed and published in Steubenville aforesaid) of the real democracy of the country, of those who wish the farmers to get a good *price [192 for their produce, and who wish wealthy men, like the said editor, to be confined to moderate profits upon their money." And, in another part of said libel, the following: "Mr. Editor Tappan is an officeholder. He gets one thousand dollars a year for about one month's service, and yet he has the conscience to desire to make his one thousand dollars worth twelve hundred and fifty, by oppressing the farmers and mechanics, and lowering their prices. Farmers and mechanics think of this." And in another part of the said libel the following: "Judge Tappan, having in his last *mud machine* (meaning as aforesaid, also meaning that the said newspaper was owned and published by the said Benjamin, while judge, as aforesaid) published the paragraph from the Globe, headed, the veterans of the revolution, he ought, we should suppose, to have availed himself of the earliest opportunity to show that the Globe had made a misstatement; but the judge has not yet done so. What makes the matter worse, on the part of

Judge Tappan, is the fact, that the above explanation was made in the United States Senate, on the 25th February, and was published in the National Intelligencer of the 27th, yet the offensive article is republished in the said *mud machine* on the 12th March inst., without Mr. Webster's explanation and denial;" thereby meaning that the said Benjamin had published a wicked and malicious libel on the said Webster, then being a member of the United States Senate. And, also, in another part of said libel, the following: "What does that gentleman expect to gain by attacking the character of Mr. Webster? It is true he may gratify his propensity for misrepresentation, and that is all" (meaning he, the said Benjamin, was in the habit of publishing falsehoods). "His abuse of Mr. Ewing, because that gentleman franked some speeches to individuals of this section of country, heretofore differing from Mr. Ewing in politics, is further evidence of the malice which he feels toward all who differ with him in opinion." By means whereof, etc. To this declaration the defendant filed a general demurrer.

TAPPAN, prose.

COLLIER and MARSH, for defendant.

*Opinion of the court, by Judge WOOD: [193

But one question is raised for decision: Are the matters set forth in this declaration, as there pleaded, *libelous?* A libel is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent toward government, magistrates, or individuals. It does not necessarily charge the plaintiff with a crime, for if its design be wanton and malicious ridicule, and the tendency of the publication to hold up the plaintiff to the scoffs and sneers of society; to degrade him and lessen his standing, an action may well be sustained. So, likewise, if its tendency will naturally excite to passion and revenge, and consequent breaches of the peace. Justice Thompson, in the People v. Southwick, 9 Johns. 214, says: "To permit the press to become the instrument of malicious ridicule and contempt of individual character, would not only corrupt the moral taste, but speedily set society by the ears; and the common good of every people demands that, thus far, it should be restrained." An editor may,

nevertheless, comment freely on the acts of government, officers, or individuals, and indulge in occasional *mirth* and *wit*, and it is only when the character of the publication is malicious and its tendency to degrade and excite to revenge, that it is condemned by the law, and subjects the publisher to sustain a prosecution.

We have carefully perused this declaration, and are unable to perceive that it charges the defendant with having published of the plaintiff such terms of reproach or epithets, as can be seriously claimed, in their natural tendency, to excite the passions to revenge; nor can we discover anything which is calculated, in its result, to cast upon the plaintiff that contempt, which is calculated seriously to degrade him, or lessen his standing in the esteem of the world.

The declaration does not charge the publication to be made of the plaintiff, as judge; but states the fact that he was a judge of said district court, and avers the publication was of Benjamin Tappan, *innuendo*, that it was made of him as a judge. The office of the *innuendo* is to direct to its object the charge made. It can neither enlarge nor restrain the natural sense and import of the words used; if they do not convey the sense and meaning, when their application is explained, the *innuendo* can not aid them. On the whole, we are of the opinion the demurrer should be sustained.

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*Catherine McFarland *v.* Febigers' Heirs and others. [194

Where a wife is named only in the clause describing parties, and in the attesting clause of a deed, the covenants all being by the husband alone, and no terms employed touching the wife's contingent estate of dower, the wife is not concluded, though she join in a formal execution of the deed.

*Feme covert* executing a deed purporting to convey her dower, with the belief that it is defective for that purpose, with respect to which she is silent, is not affected by such silence if the deed prove inoperative.

This cause was adjourned from the county of Hamilton. It was a bill in chancery for dower, filed in the usual form. The answer of the defendants admit that the husband of the complain-

ant was seized of the lands in which dower is sought, but avers that the two joined in a conveyance to the Bank of the United States, under whom the defendants claim. This deed is made an exhibit. It commences thus: "*This indenture made,*" etc., "*between S. McFarland and Catherine, his wife, of the first part, and the Bank of the United States, of the second part, witnesseth, that S. McFarland for and in consideration,*" etc., "*hath sold,*" etc., running through all the operative parts as the single acts of S. McFarland, and concluding thus: "*In witness whereof said Stephen and Catherine have hereto set their hands and seals.*" It is signed and duly acknowledged by both.

The defendants in their answer put certain interrogatories to the complainant, and call upon her to answer them. In her answer she avers that the land was purchased with her individual separate property derived from her father, and brought to her husband at their marriage; that the price for which it was sold was applied to the payment of debts contracted by her husband, as security; that her family and herself derived no benefit from it; that she was induced to execute the deed to preserve a good understanding and peace with her husband, and did it unwillingly; that she was apprised before she executed the deed that it was insufficient to deprive her of her dower; that she executed it in this belief, and would not have executed it at all, had she considered it as extinguishing her rights. The cause rested on the bill and answers and the deed.

MORRIS and DRAKE, for complainant.

WRIGHT and WALKER, for defendants.

Judge LANE delivered the opinion of the court:

The defense rests upon two positions: 1. That the deed itself 195] presents a bar. 2. That the complainant practiced *such a fraud, in the execution of the deed, as precludes her from asserting her claim.

However trite the saying that courts should favor dower, it must not be forgotten in adjudicating these questions. This estate is given, by the common law, as a kind of compensation for the disabilities attaching to the wife in a state of coverture. It is not to be cut off without a somewhat strict compliance with the

formalities which the law has provided as securities against imposition.

The mode of destroying dower, which is an American usage, is by the wife joining with the husband in a deed containing words calculated to operate upon her contingent rights. Unless the deed contain words applicable to her estate, and evinces her intention to convey it, it is the deed of the husband only. 9 Mass. 218; 13 Ib. 223; 3 Mason, 347; 4 Kent's Com. 58. This deed contains no such terms. The wife joins in nothing that touches her rights. The recitals go no further than to assert that the wife witnesses that the husband conveys his estate. The husband alone covenants; he alone is concluded.

The alleged fraud consists in the facts that a married woman joins her husband in a deed which she conceives to be inoperative as to herself, but is silent upon that subject. Whatever might be the effect of such conduct in one acting in her own right, and making her own contracts, it can not be imputed as a fraud to a married woman, disabled to contract except upon one subject, and upon that only in prescribed forms. The case is not like that of Smiley *v.* Wright. There the woman was a *feme sole* when the transactions took place that were held to bar her of her then subsisting dower. Here the complainant had no agency in making the contract or in preparing the deed. All this the purchaser transacted with the party whose title he obtained. The wife was passive. She was not bound to be otherwise. She assigns a sufficient reason for her passiveness and for her action, as far as both went. In her circumstances, there is no taint of fraud in her conduct. Her right remains unaffected by it, and stands upon the terms of the contract. As these do not conclude her, she is entitled to a decree for dower.

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*Wood and Abbott *v.* Funk and Shultz. [196

Where the natural interpretation of the terms used in a plea shows a good defense, exception can not be taken on general demurrer.

Discharge under the insolvent law, on process from a state court, discharges from imprisonment, on process from the United States circuit court.

THIS cause was adjourned from the county of Hamilton. It was an action of debt on a prison bounds bond. The following are the facts of the case:

At the July term, 1833, of the circuit court of the United States for the district of Ohio, the plaintiffs, being citizens and residents of the State of Pennsylvania, recovered a judgment against Bailey Keys for six hundred and sixty-four dollars and fifty-seven cents damages, with costs of suit, in an action of *assumpsit* on a promissory note.

On November 5, 1833, a *ca. sa.* was issued on the judgment, directed to the marshal of the district. Keys being arrested, on the 21st November he executed a bond to the plaintiffs, together with the defendants, as securities, in the sum of one thousand three hundred and ninety-four dollars and forty-six cents, with a condition that he would abide within the jail limits until legally discharged.

In August, 1834, Keys was discharged under the insolvent law of Ohio. He soon after went without the prison bounds, when this suit was brought.

The declaration is in the usual form, Keys being returned "not found." In addition, it alleges that when the judgment was obtained, the plaintiffs were citizens and residents of Pennsylvania, and have been ever since.

The defendants plead in bar of the action against them, that in February, 1834, Keys being under arrest by virtue of an execution issued from the court of common pleas of Hamilton county, applied to the commissioner of insolvents for the benefit of the act for the relief of insolvent debtors; that he exhibited to said commissioner a schedule of his property, and of the debts which he owed, and among others the judgment of plaintiffs; that he executed an assignment of his property to the commissioner and took the oath required by law, and obtained from him a certificate of his having complied with the act; that the commissioner returned his proceedings to the court of common pleas at August term, 1834, when Keys appeared in court and presented his petition for a final discharge; that the court, after examining the proceedings, did grant, order, and adjudge to said Keys a certificate of his having complied with the provisions of the act and obtained the relief therein provided, which judgment being in full force, Keys be-
197] came legally discharged from imprisonment, *and accord-

ingly went without the limits of the jail. To this plea there is a demurrer, and whether it is a bar to the action is the only question for the decision of the court.

STAR, for the plaintiff, and in support of the demurrer, insisted that the plea was insufficient in not alleging that a certificate of discharge, in form, had issued from the court of common pleas of Hamilton county to the sheriff, for the discharge of Keys. Also, that Keys, being in custody under the process of the federal court, could not be lawfully permitted to leave the bounds, upon a discharge, upon process from the state courts.

FOX, contra.

Judge LANE delivered the opinion of the court:

The plaintiffs' counsel insists that the certificate of the court, that constitutes the discharge of an insolvent debtor from custody, is not sufficiently set out in the plea. This objection is not well taken by a general demurrer. The natural interpretation of the defendants' averment shows a substantial compliance with the law.

The important inquiry upon these pleadings is, whether the insolvent laws of Ohio operate to discharge from imprisonment a debtor in execution under process from the circuit court of the United States, on a judgment recovered in that court by a citizen of another state? This has been a point of much difficulty, from which we are now in a great measure relieved by the action of the proper functionaries of the United States themselves. We have only to follow the Supreme Court of the United States to decide this case. That court has adjudged that the right to imprison on process is no part of the contract; that a discharge from imprisonment does not impair its obligation. 4 Wheat. 200; 12 Wheat. 370. That, though state laws by their own power do not control or affect the process of the United States courts, yet Congress may adopt such laws directly, or may confide authority to the courts to do it. 10 Wheat. 1, 57; 12 Wheat. 213.

The act of Congress of December, 1828, adopted for the circuit courts of the United States sitting in Ohio, the forms of process and modes of proceeding then existing in our highest state courts of general jurisdiction, including the exemptions *from [198 arrests and imprisonments provided by the state laws. The in-

solvent laws of Ohio provided for liberating persons imprisoned for debt in 1828. The subsequent law contains similar provisions, and the act of Congress preserves the law of 1824, in its provisions embodied in the law of 1831. No change was made in the forms of process or modes of proceeding. Upon the principles settled (9 Pet. 362), we hold that Keys was legally discharged, and that judgment on this demurrer be given for the defendants.

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LESSEE OF A. AND W. H. EWING v. H. HIGBY.

In a proceeding by administrator to sell decedent's real estate, for the payment of debts, if minor children, not named in the petition, actually have an appearance entered for them in court by their guardian, pending the petition, they are bound by the order of sale. The irregularity does not affect the title.

Sale of a part of a tract of land may be made by an administrator, though the petition prays, and the court orders the sale of the whole.

An equitable title may be sold by an administrator.

An administrator selling real estate, under an order of court, may convey to the assignee of the original purchaser.

THIS cause was adjourned from the county of Wood. The whole case is fully stated in the opinion of the court.

COFFINBERY and SPINK, and O. PARISH, for the plaintiffs.

J. M. MAY, WILCOX and ANDREWS, for defendant.

Judge COLLETT delivered the opinion of the court:

On the trial of this ejectment in Wood county, a verdict was given for the plaintiffs, and a motion made by the defendant for a new trial, which was reserved to be decided in this court.

This action is brought to recover the undivided three-fourths of lot No. 572 of five hundred acres in the United States reserve of twelve miles square, in the county of Wood. On the trial it was admitted that Samuel Ewing died seized in fee simple of this lot, and it was proved that the lessors are two of his children and

heirs. The possession of the defendant was admitted. After this case had been made by the plaintiffs, the defendant gave in evidence a copy of the record in the court of common pleas for the county of Wood, of the proceedings and orders of the court on the petition of John Hollister, the administrator of said Samuel Ewing, deceased, from which it appears that at the April term of the court, the administrator filed his petition, which stated the deficiency of assets, and necessity to sell this whole tract to pay the debts due from the estate, and that Samuel A. Ewing and John A. Ewing were the sons *and only heirs of Samuel Ewing, [199 deceased, and prays that they may be made parties, etc. At October term, 1825, an order was made on the petition that the said Samuel A. Ewing and John A. Ewing, minor heirs, etc., should be cited to appear at the next term, to show cause why an order should not be made to sell said tract of land, or such part thereof as might have belonged to the intestate. At the same time, Thomas W. Powell was appointed guardian *ad litem* for the heirs, and Samuel Spafford, Ambrose Rice, and John Webb were appointed to appraise the land; afterward a citation issued to Payne C. Parker, guardian of Samuel A. and John A. Ewing, minor heirs, etc., citing him to appear at the next term of the court, to show cause why an order to sell the land should not be made, which was served and returned to the next term. At the next term, which was in April, 1826, the court appointed Robert Forsythe an appraiser, in the place of John Webb. Hiram P. Barlow, guardian of the lessors, came into court and acknowledged notice of the petition to sell said land, and the appraisers returned their appraisement of an undivided three-fourth part of said land at two hundred and seventy-five dollars. On the coming in of the report, the court made this order: "The appraisers heretofore appointed to appraise the real estate of Samuel Ewing, deceased, came into court and made report of their doings, as per appraisement on file, and it appearing to the court, by the settlement of said administrator, that said estate is altogether insolvent, it is therefore ordered by the court that the whole of said lands be offered for sale, under the provisions of the statute in such case made and provided."

The defendant also gave in evidence a deed, made by the said administrator, Samuel Hollister, and duly executed, dated October 14, 1826, to Elnathan Corey, for an undivided three-fourths of the

said five hundred acres, which recites, that in pursuance of the order of court, after giving notice of the time and place of sale, according to the statute, he had sold said three-fourths of said land at public sale, to Benjamin F. Hollister, for two hundred and fifty dollars; that Benjamin F. Hollister had relinquished his right to Elnathan Corey; and then proceeds, that in consideration of the payment of said two hundred and fifty dollars by the said Corey, he, the said administrator, grants, bargains, and sells to said Corey, his heirs and assigns, forever, "all the equitable interest 200] of and to the said undivided three-fourths *of said tract of land of the said intestate at his death," etc., "and all the right, title, and interest which the said Samuel Ewing had, at his death, to the undivided three-fourths," etc. Also, a decree of the court of common pleas of the county of Wood, in a suit in chancery, in which Solomon Sibly was complainant, and William A. Ewing, John A. Ewing, William H. Ewing, and Anthony Ewing, heirs of Samuel Ewing, deceased, are defendants, by which an undivided fourth part of the said five hundred acres of land was vested in fee in the complainant, Sibly. This decree was made on October 29, 1825. Also, a deed made by Sibly on March 23, 1832, whereby he conveyed to Corey the said undivided one-fourth of said five hundred acres in fee. The defendant also gave in evidence a deed made and duly executed, by Corey to the defendant, dated March 16, 1833, conveying to him the whole tract of five hundred acres in fee simple.

This motion for a new trial depends upon the validity of the administrator's deed. The plaintiffs insist that it is void as to them:

1. Because they were not parties to the proceedings in which the order to sell was made.

2. Because the petition prayed, and the court ordered, the *whole* tract to be sold and the administrator sold a *part* only.

3. Because the deed conveys the *equitable* title only, and not the *legal estate.*

4. Because the deed is made, by the administrator, to *E. Corey*, and not to *B. F. Hollister*, the successful bidder at the sale.

An order of the court of common pleas, to sell the land descended to the heirs, on the petition of the administrator, is the order of a court having jurisdiction of the subject, and is as conclusive on all interested in the land as a judgment or decree. A

purchaser under such order holds his title as securely as a purchaser at sheriff's sale under a judgment at law or a decree in chancery. To defeat his title the order can no more be attacked collaterally than a judgment or a decree; and although it may be erroneous or irregular, a title acquired under it by a stranger, before it is reversed or set aside, is as good as though it was not erroneous or irregular. 3 Ohio, 257, 325, 561; 4 Ohio, 130; 2 P. R 163; 2 Bin. 46.

The question, as to the proceedings of the court on the petition, is *not* whether they are erroneous or irregular and *voidable*, but whether they are *void*. The administrator, in *obtaining an [201 order to sell land, acts for the creditor and heirs; the money raised does not go to his but to their use. He is generally a friend of the deceased, and a friend and confidant of the heirs. The legislature, therefore, until 1824 (*vide* 22 Ohio L. 130, sec. 9), did not require the heirs to be made parties to these petitions. Before that time they were all *ex parte*. The act of 1824 did not direct in what manner they should be made parties, what process should issue, or how it should be served; the court of common pleas were under the necessity of using such process, and taking such measures as they thought legal and proper in making the heirs parties. Some have pursued one course and some another, especially as to minors.

The object of the law was, that the heirs should have notice of the application of the administrator for an order to sell their land, and process served on a minor heir, who may be not a year old, could have no other effect than to give notice to its friends. In this case the proceedings were in the year 1825, before any settled practice under the act of 1824. At the time of filing the petition, the administrator did not probably know that the lessors were heirs. He states that Samuel and John were the only heirs. The court, before process issued to them, appointed Powell, their guardian, to defend; then process issued to their regular guardian, Parker, not to the infants or guardian *ad litem*. On the return of the service on the regular guardian, Parker, the heirs were considered in court, and as to them the order was made. At the same time, April term, 1826, Barlow, the guardian of the lessors, appeared in court and acknowledged notice of the pendency of the administrator's petition. The court then had the return of the process served on the guardian of Samuel and John, and the

appearance of the guardian of the lessors and acknowledgment by him, in open court, of notice of the pendency of the petition on which the order was made. The appointment of Powell as guardian is of little consequence; he entered no appearance, and may not have known of the appointment. 3 Ohio, 364. The court, when they made the order, must have determined that, by serving process on the guardian of Samuel and John, and by the appearance of the guardian of the lessors, the four heirs were parties to the petition, within the meaning of the act of 1824. And this was a matter of which they had jurisdiction. Indeed, they 202] were compelled to *determine this question. They could not get along without. The notice was substantially as good as it will be to minors under the act of 1831 (29 Ohio L. 237), which requires notice of the filing of the petition to be given in the same manner that notice is given to defendant in chancery of the filing of a bill. By this act, process must be served on the infants, if they are within the state; this will indirectly give notice to their friends, on which it will be the duty of their guardians, if there be any, to see to their defense. Prior to the act of 1824, proceedings of this kind were summary—they were *ex parte*. Since, we have reason to think, they have continued nearly as much, and it may be too much so; they have conformed more to proceedings on petitions for partition than suits in chancery. Rules have not always been given for answer where a guardian *ad litem* has been appointed—an answer has not in all cases been put in by him unless he made objections to the order; frequently, in consequence of this, no entry of appearance has been required by the common pleas. The act of 1831 only regulates the mode of *summoning* and *notifying* the defendants; as to everything else in making infants parties to these petitions, the practice will be found to differ in the various courts of common pleas, and it is probable that it will not do to test them, even on *certiorari* or *error*, by the rules governing courts of chancery. Our chancery proceedings will not in everything bear this test. In England, after process is served on an infant defendant, he must in person be brought into court, that the court may appoint him a guardian to defend, or, if he can not be brought in, commissioners appointed by the court must attend him to make this appointment. Hind's Chan. Prac. 98, 240. This is never done here; in consequence of which we hold that it must appear that the guardian appointed to defend had no-

tice of his appointment, and must at least do something to signify his acceptance of the appointment. 3 Ohio, 364.

In the case of the Lessee of Heister *v.* Fortner, 2 Bin. 40, which was an ejectment to recover a tract of land, the lessor claimed as a purchaser at sheriff's sale to satisfy a judgment on a *scire facias.* The judgment was unjust, and was also irregular; it was taken without a service of the *scire facias*, and on the return of but *one nihil*, when there should have been *two.* The court held the sale of the sheriff good. *Justice Yates says, "That the judg- [203 ment was wholly irregular, and that the court from which the process issued would, without hesitation, have set aside the sale on both the grounds alleged, if application had been made to them previous to the acknowledgment of the sheriff's deed. The judgment, also, would have been reversed on error." This judgment was unjust, and the defendant had no notice; that was not done from which the law infers a notice. Yet the court had jurisdiction; error on the merits, in the process, or service, or in the return could not be collaterally inquired of to defeat the title of the stranger who purchased the land. He looked back only to the judgment, the execution, and, where the sale is after the return day of the execution, to the levy. 4 Wheat. 508; 4 Pet. Cond. 521. In Dabney *v.* Manning, 3 Ohio, 326, this court say that, on an order to sell land in a partition case by an administrator, when it should have been by the sheriff, and the administrator sells, the purchaser gets a title as good as though the sheriff had been ordered to sell or had sold; the court had jurisdiction; their error does not affect the title.

As to the second objection, that the prayer of the petition and the order of the court was to sell the whole tract, and the administrator sold a part only. In April, 1825, when the administrator filed the petition, the heirs appeared to own the whole tract; at the next October term one-fourth of it was decreed to Selby; then the court order that the heirs be cited to show cause why the whole or *so much* of the tract of land as belonged to the intestate should not be sold. At April term, 1826, the court receive the appraisement of an undivided three-fourths of the tract only, and reciting it, order all to be sold, showing plainly that *all* meant *all appraised, all belonging to the heirs after deducting Selby's part.* If the prayer of a petition is to sell a whole tract, and on the appraisement the court find that a part will pay the debts, then it

is their duty to order a sale of a part only. So, if it is found by the court, that the intestate owned a part only of the tract, the court may and ought to have part only appraised and sold, as they have done here.

It is further objected, that the administrator's deed to Corey conveys the equitable estate only, if any. By the deed, the administrator, in terms, "grants, bargains and sells" to Corey, "his heirs and assigns forever, *all the equitable interest*" of the 204] *said intestate, at the time of his death, of and to the said undivided three-fourths, and "all the right and title and interest which the said Samuel Ewing had at his death to the undivided three-fourths," etc. These two clauses are undoubtedly sufficient to convey the legal estate, as it was undoubtedly in the intestate at his death; the United States by patent granted it to him.

The remaining objection is, that the deed was made by the administrator to Corey, when at the public sale the land was struck off to B. F. Hollister. It appears from the recitals in the deed of the administrator, that, at the sale, Hollister bid for the land two hundred and fifty dollars, two-thirds of the valuation, and that it was struck off to him; that, with his consent, Corey paid the administrator the two hundred and fifty dollars, and received the conveyance from the administrator to himself. On the payment of the money by the successful bidder, the law requires the conveyance to be made to him; this is for *his benefit*—if he directs it to be made to another, are the heirs injured? Should they, after the money has been paid to the administrator to pay their father's debts, because of this, retake the land? If the successful bidder should pay the purchase money and die before conveyance, his heirs could surely obtain of the administrator a conveyance; the sale could not be avoided on that account; the act of God works no injustice. If the administrator might convey to the heir, why not to an assignee? I can see no objection to it. It is not unusual, at public sales, for the name of another to be substituted for that of the actual bidder, with consent of all concerned. The like might have been done in this case—it amounts to the same thing, and I like this better, because it shows the real truth of the transaction. In Kentucky, it is held that a sheriff may convey to the assignee of the purchaser at his sale. 1 Dana, 212.

Upon the whole, the motion for a new trial is overruled.

## DAVID S. DAVIS *v.* STATE OF OHIO.

**Indictment for permitting gambling must recite the parties, or allege that they are unknown. It must also specify whether the game was for money or other valuable thing.**

THIS was a writ of error, reserved for decision in the court in bank in Montgomery county. Davis was indicted for permitting gambling in his house. The indictment set forth in *these [205 terms, "that David S. Davis, late of, etc., in the county of Montgomery aforesaid, on March 6, 1834, and on divers other days and times, with force and arms, at, etc., unlawfully did suffer and permit certain evil disposed persons to play for gain, with cards, in a certain house, then and there in the possession of the said D. S. Davis, contrary to the statute," etc. Davis pleaded guilty, and moved the court in arrest of judgment. The motion was overruled, and judgment entered that he pay a fine of fifty dollars, and to reverse which this writ of error was sued out.

The error assigned, was the too great generality of the indictment.

R. A. THRUSTON, for Davis:

It is a general rule, that all the circumstances which *make up and constitute* an act of crime should be stated. 15 Arch.; 2 East, 30; 5 East, 244; 1 Chitty, 230.

The indictment must set forth with certainty the particular crime charged. 10 Peters. Ab. 470.

The *manner* of the whole fact ought to be set forth. An indictment accusing generally is bad. 2 Hawkins Pl., ch. 25, 57, 59; 1 Salk. 196.

P. P. LOWE, prosecuting attorney, for the state:

It is not necessary, in an indictment for this offense, to give the names of the persons who are permitted to play. It is not necessary in England, and the courts of Massachusetts have so ruled it. Were the principle contended for adopted, it would always be in the power of a defendant to evade conviction, as he might, with legal propriety, call on fifty witnesses different from those named in the indictment, who would or might swear that the defendant

permitted them to play about the same time as alleged in the indictment. There is the same necessity to adopt this form of indictment in this country, as against one keeping a common gaming house, either here or in England. 3 Pick. 281; 4 Pick. 251; 5 Pick. 41, 42.

"Cards," being denominated a game in the statute, it is not necessary to aver it to be a "gaming device." 3 Pick. 281.

206] *Judge COLLETT delivered the opinion of the court:

This indictment is founded on section 9 of the act for the prevention of gaming, which provides, "that if any person or persons shall suffer any game or games whatsoever to be played for gain, upon, or by means of any gaming device, or machine of any denomination or name, in his, her, or their house, booth, or arbor, or erection of which he or they have the care or possession, the persons so offending shall," etc.

An indictment charging an individual with an offense against law must so describe the offense as to show that the law has been violated. The law operates upon a given state of facts. These facts must be set out in the indictment distinctly and clearly; first, to enable the defendant to make defense, if he be unjustly accused; second, if he be convicted, to enable him to plead and prove that conviction, in bar of a second prosecution, upon account of the same transaction.

We think this indictment should have either set out the names of the parties that it charges the accused permitted to play, or, if the names were unknown, it should have been so alleged. We think it should also have specified whether the playing was for money, or other valuable things. For these deficiencies, the judgment must be reversed.

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JOSHUA PORTER v. ROBB AND OTHERS.

If the owner of an entry in the Virginia military lands, makes a mistake in surveying it, and obtains a patent accordingly, equity can not aid him to place it on the land the entry properly covered.

Porter v. Robb et al.

Where a boundary has been much litigated, and different verdicts rendered, equity, under proper circumstances, will direct a retrial in favor of the party in possession.

THIS is a suit in chancery, to enjoin a judgment in ejectment, recovered by the now defendants against the plaintiff, in the Supreme Court for Clermont county.

On August 2, 1787, Captain John Dandridge made the following entry:

"*August* 2, 1787.

"No. 437. Captain John Dandridge enters one thousand acres of land, part of the military warrant, No. 77, on the Ohio, beginning two hundred poles on a right line, below the mouth of a creek, emptying into the Ohio, by computation ten miles above the mouth of the Little Miami, and nearly opposite a creek of equal size, running in on the opposite side, running thence up the meanders of the Ohio four hundred poles on a direct line; thence out at right angles, to the general course of the river, for quantity, including the mouth of the creek. The above recited creek, on *which this entry lies, is remarkable for an Indian crossing [207 place, and a large deer lick thereon."

On August 8, 1787, Major David Stephenson made the following entry:

"*August* 8, 1787.

"No. 722. Major David Stephenson enter one thousand two hundred acres of land, part of a military warrant, No. 347, adjoining John Dandridge's entry No. 437, on Cross creek, beginning where his back line crosses the creek, thence out on each side with Dandridge's line two hundred and fifty poles; thence up on both sides for quantity."

On August 10, 1787, Richard J. Waters made the following entry:

"*August* 10, 1787.

"No. 921. Richard J. Waters, assignee, enters one thousand acres of land, part of a military warrant, No. 2,556, adjoining David Stephenson's 'entry No. 722 on Cross creek, a branch of the Ohio, beginning where the said Stephenson's upper line crosses the creek, running with his line out from the creek, each side, till the line is four hundred poles long, thence up the creek on both sides, keeping it in the middle of the survey for quantity.' "

On August 14, 1787, John Crawford, heir, made the following entry:

"*August* 14, 1787.

"No. 1,160. John Crawford, heir, enters one thousand acres of land, on part of a military warrant, No. 19, on Cross creek, beginning at Richard J. Waters' north corner of his entry No. 921, running with his line eastwardly four hundred poles, thence at right angles northwardly for quantity."

John Obannon surveyed these entries. That of Dandridge is dated January 6, 1788; that of Stephenson the day after; that of Waters, February 5, 1788, and that of Crawford is dated May 1, 1796. The survey of Stephenson calls for that of Dandridge; Waters' for Stephenson's, and Crawford's for Waters'. Before the survey of Crawford's entry, four hundred and seventy-five acres were withdrawn, without stating from what part, and the remainder, five hundred and twenty-five acres only, was surveyed. A patent issued on this survey of Crawford to his assignee, Noble Grimes, dated April 12, 1800, from whom, through several intermediate conveyances, the complainant derives his title to one hundred and eighty-two and one-half acres on the south side of this claim 208] *of Crawford. He has been for many years in possession, and has made valuable improvements.

The survey of Waters was, in 1823, patented to Robert D. Dawson, from whom the defendants derive their title. Waters' survey, as claimed by the defendants, covers nearly the whole of the land of the complainant. If his survey was so made as to have an equal number of acres on each side of the line, designating the general course of the creek within the survey, it would not interfere with Crawford's survey.

Fox and Goodenow, for complainant.

Fishback and Marshall, for defendants.

Judge Collett delivered the opinion of the court:

The complainant alleges that the premises he claims are within Crawford's entry, and not within the entry of Waters, and that if they are included within Waters' survey, and not within Crawford's, it is owing to mistake or fraud on the part of Waters, and that this mistake or fraud on the part of Waters, caused Crawford

by mistake not to include them in his survey, he being ignorant of the error in Waters' survey. He also alleges that Waters' survey, so far as it includes lands without his entry, is void, and on these grounds he claims relief.

A warrant which can be located in the Virginia military district authorizes the owner thereof to locate the quantity of land it calls for, on any unlocated land in the district. In doing this, he is required to make his location or entry "so specially and precisely as that others may be enabled with certainty to locate other warrants on the adjacent residuum." Swan's Land Laws, 127. When an entry is so made, it withdraws the land described from the mass of vacant land, and appropriates it to the satisfaction of the warrant, or so much of the warrant as is called for by the entry, but it withdraws no more nor any other land.

The entry is the only notice of the location until it is surveyed. After an entry is made, others examine it, ascertain what land is called for, and locate in the neighborhood of and adjoining it. That the previous entry should afterward be surveyed on other lands, so as to interfere with these subsequent locators, would be the grossest injustice. Crawford's *entry was made before [209 that of Waters' was surveyed, and calls for Waters' entry, making the line which bounds Waters' entry on the north the base line and south boundary of Crawford's entry; Waters' entry requires the creek to be kept in the middle of the survey, that is, that equal quantities of his land should lie on each side of the creek, or on each side of the line to be drawn on the general course of the creek as it passes through his survey. 1 Marsh. 130; 5 Peters, 488. If the survey was so made, it does not interfere with Crawford's entry or survey. If it was surveyed as the defendants contend, it includes nearly all the complainants' land, and more than two-thirds of the land included in Waters' survey is on the north side of the creek, and at least one-third of it north of his entry, and on land included in Crawford's entry. Crawford's entry was made in August, 1787, only a few days after that of Waters. Waters surveyed his entry in 1788. Crawford surveyed in 1796. Had Crawford disregarded Waters' survey, and run the line bounding Waters on the north, where it should have been run, according to Waters' entry, and made that line the southern boundary and base line of his survey, this would have been, as it regarded Waters, according to the entries

of both—then the survey of Waters could not have affected Crawford's title. But Crawford did not do so; he regarded the survey of Waters as being according to his entry, and made his own survey to adjoin Waters' survey. In 1800 Crawford's assignee obtained a patent for the land as surveyed by Crawford.

The survey is the party's construction of this entry; it is supposed to be directed by him. In fact, in making these locations the surveyor was almost always the hired agent of the owner of the warrant, employed to make both the entry and the survey. It was held, in Kentucky, that a survey recorded satisfied the warrant, or that the warrant was merged in the survey, and that no alteration could afterward be made. The warrant, the authority to the party, was satisfied, and could not be again set up. Hard. 567; 1 Marsh. 130. The Supreme Court of the United States have decided that, after a survey in this district has been recorded, the entry and survey may be withdrawn, 7 Wheat. 23; and that after they are withdrawn the warrant may be relocated. 4 Pet. 342.

210] After a patent issues the power of the party over his *warrant or location is gone. The entry and location have been made under his direction; he has returned to the government his survey and warrant, and asked for and received a grant vesting in him the fee of the land granted, whether it was within his entry or not; whether his entry was good or not. The land patented can not afterward be re-entered, no matter how irregularly it may have been entered or surveyed. It is no longer vacant or unappropriated, but is vested in the patentee. 7 Wheat. 212; 5 Pet. Cond. 272. All the equity is merged in the grant. 2 Pet. Cond. 528; 7 Cranch, 354. When a patent issues the government retains the warrant, and in case the patentee or his alienee is evicted, the patentee can, on application, obtain his warrant for relocation. Act of Congress, passed May 13, 1800; Swan's Land Laws, 133. If a person could enter land in one place, survey in another, by patent obtained from the government the land surveyed, and then set up his claim to the land described by his entry, he would defraud the government. If the land that he had entered, but had excluded from his survey and patent, had been located by another, he would defraud him. There is no evidence of fraud in this case. The mistake, if there is one, we can not relieve against. To relieve would shake more than half the titles between the Scioto and Little Miami rivers. Almost every survey

includes more land than the entry calls for, and so far is a departure from the entry by covering ground not included within it. Most of the entries were made as in this case, calling one for another; Stephenson's entry calls for the upper line of Dandridge; Waters' calls for the upper line of Stephenson; Crawford's for that which is the north line of Waters'. These entries were all made before any of them were surveyed. Obannon, who probably made all the entries, surveyed them all. The return of the county surveyor shows that Dandridge's upper line is twenty poles too far up the creek. It is four hundred and twenty poles from the base, whereas it should have been but four hundred. This twenty poles is on Stephenson's entry. Obannon, in surveying for Stephenson, took this line, as run by him for Dandridge, as the lower line of Stephenson. This threw Stephenson twenty poles on Waters' entry. As Stephenson has a larger entry than Dandridge, and probably a proportionate surplus, it is then probable that his survey encroached at least forty poles upon Waters' entry. This caused Crawford, by having to begin at a corner of *Waters', to be thrown a considerable distance farther from [211 the Ohio than he would have been had there been no mistake made by Obannon in making this chain of surveys. Before he made his survey Crawford had it in his power to have corrected all these mistakes, so far as they affected his entry. He might have brought himself nearer the Ohio, as well as nearer Cross creek. If he can now go out of his patent south, on to Waters' survey, because his entry was there, he can also go east toward the Ohio on to Stephenson's survey for the same reason. And thus a very great proportion of the landholders within the Virginia military district might be disturbed and injured if mistakes such as Obannon here committed could be corrected.

The complainant contends that in fact he has the legal title to the premises, and having the possession, that the defendants should, on this ground, be decreed to release to him, and the injunction be made perpetual. The patent of Grimes on Crawford's survey was granted in 1800; that of Dawson on Waters' survey, in 1823; so that if the premises in controversy are within Crawford's survey, the complainant has the legal title.

The complainant long ago settled in the woods upon the premises, and has ever since improved them, claiming under Grimes' patent. Whether the line by which the complainant claims, or the

line by which the defendants claim, is the original line between the surveys of Crawford and Waters, has been a subject of much litigation between persons owning parts of Crawford's and parts of Waters' surveys, and of the adjoining dependent surveys, and the verdicts have been some in favor of one line and some in favor of the other.

Section 14 of the act regulating the chancery practice, 29 Rev. Stat. 33, authorizes the filing of a bill by him who is in possession of, and has the legal title to, a tract of land, against him who claims title to it, to quiet the title of the possessor, if he should show to the satisfaction of the court that the legal title is in him. For the purpose of ascertaining, as satisfactorily as this case will admit, where the true line between these surveys is, the court will order a *retrial* of the ejectment in the Supreme Court, as an original issue ordered by this court.

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212] *JOSIAH OSBURN *v.* THE STATE OF OHIO.

The record book is admissible evidence, although the records have not been examined and subscribed by the president judge.

A naked statement of facts, in a bill of exceptions, it not being shown wherein their occurrence at the trial prejudiced the complaining party, lays no ground for reversing a judgment.

Where, in a prosecution for perjury, a written paper is referred to, the place and time of subscribing it by the accused being involved in the alleged perjury, as set forth in the indictment, such paper is proper evidence at the trial.

It is not error, where the record book has been read to the jury, if the court refuse to make an order to send it with them to their room of deliberation.

Upon a writ of error nothing is examinable but what is set forth in the transcript of the record.

THIS cause was adjourned from the county of Clermont. It was a writ of error brought to reverse a judgment in a prosecution for perjury, in which the plaintiff in error was convicted and sent to the penitentiary.

The case was presented to the court upon four bills of excep-

tions, taken in the progress of the trial before the common pleas. The indictment set forth that, at a previous term, Osburn had been examined as a witness, between the state and one W. Ackles, tried also upon an indictment for perjury; that upon that trial it became a material inquiry whether Osburn was at a certain wedding, which took place at the house of one T. N. Williams, on February 11, 1830, and whether said Osburn, at the wedding aforesaid, in the house of T. N. Williams, signed a certain subscription paper, by which he agreed to send one scholar and a half to a school which one Harvey A. Bigam then and there agreed to teach, and whether the said Wm. Ackles saw the said J. Osburn sign said paper, and whether said J. Osburn signed said paper at a certain shooting-match on the premises of T. N. Williams. The indictment proceeds to state that Osburn was examined as a witness to these points; that he testified that he was not at the wedding, that he did not sign the subscription paper at the wedding; that William Ackles was within two or three feet of him when he signed the paper, and that it was signed at the shooting-match; all which testimony the indictment alleged, with the proper averments, to be false.

The first bill of exceptions sets forth that, at the trial, the prosecutor, to prove the proceedings against William Ackles, produced the book of records of the common pleas, which the counsel for Osburn objected to, as inadmissible at all; but as specially inadmissible, because the recorded cases were not subscribed by the presiding judge. Upon this exception the presiding judge signed the records, and the book was admitted.

The second bill of exceptions recited, that the prosecution offered in evidence, duly certified transcripts of two proceedings before a justice of the peace, in which Harvey A. Bigam was plaintiff, and Osburn defendant, the object of which suits was to recover money as due upon an account. In the first *suit, Bigam was non- [213 suited, and in the second, recovered a judgment. These transcripts were objected to, but admitted.

The third bill of exceptions stated that, in the course of the trials, one Dennis Smith was called as a witness, by the prosecution, who testified that he was present at the trial of Ackles; that Osburn was a witness on that trial; that the oath was administered by the clerk, and was taken by Osburn with an uplifted hand. This was objected to by Osburn's counsel, because the form

of the oath was not set forth in the indictment. The objection was overruled. The subscription paper for Bigam's school was then offered in evidence by the prosecution, which was objected to by Osburn's counsel, but received by the court.

The fourth bill of exceptions states that, as the jury were about to retire to consider of their verdict, Osburn's counsel moved the court for an order that the jury take with them the record book that had been used in evidence. The court refused to make such order, but instructed the jury that they could examine the record book in court, and come into court for that purpose.

To all these opinions of the court the counsel for Osburn excepted. But no one of their bills of exceptions points out, or specifies any particular matter wherein the points decided prejudiced the accused, Osburn, on his trial.

The jury found a verdict of guilty. A motion was made for a new trial and overruled, and Osburn sentenced to the penitentiary.

The errors assigned for the allowance of a writ of error are:

1. The court erred, as appears by the bills of exceptions filed, and made a part of the record.

2. The court erred, in refusing to sign the last bill of exceptions tendered, and which was signed by the president, who afterward erased his name without presenting it to the associate judges; and in refusing to grant a new trial, as stated in defendant's bill.

3. The court erred, in ordering Osburn into custody during the trial, for not finding bail, without having fixed any sum in which bail should be given.

T. Morris and Warren, for plaintiff in error.

214] Jolliffe, for the state.

Judge Wood delivered the opinion of the court:

The original records of a court are always evidence, where a copy of them duly certified would be evidence. The exemplification, under the seal of the court, is only made evidence, because the originals must be kept at a particular place, for the use and benefit of the public, to whom they belong.

It was of no importance, whether the record of the prosecution against Ackles was signed by the president judge or not. That

signature adds no validity to the record. It is required to be made, that the court shall be compelled to see that the clerk keeps up the records with the business transacted, as nearly as is practicable. The record made out by the clerk would be evidence, though not signed by the judge. An exemplification of it might properly be made, and sent abroad for use, before such signature. Affixing the signature in court was not necessary, but did not vitiate. There was no error in admitting the record book in evidence.

The second bill of exceptions states very imperfectly the facts complained of, in the admission of the justice's certified transcripts. We do not perceive the pertinency or relevancy of these transcripts to the issue before the court. Neither do we see wherein they tended to prejudice the accused. The admission of immaterial evidence, unless it is shown that some wrong was or most probably would be affected by it, is no ground for reversing a judgment. 4 Ohio, 81, 388.

The bill of exceptions points to no injury sustained by the accused, in consequence of such admission. A naked statement of the fact does not warrant this court in making it a ground of error.

The first position of the third bill of exceptions is erroneous in point of fact. The indictment sets forth the form of the oath in these terms: "The said Josiah Osburn was then and there duly sworn as a witness, as aforesaid, before the said honorable (naming the judges), that the evidence which he should give to the court and jury between the said State of Ohio and the said Wm. Ackles, the defendant, on the issue then depending, should be the truth, the whole truth, and nothing but the truth." We can see no color of exception to admitting the testimony of Smith.

The second branch of the third exception goes to the *ad- [215
mission of the subscription paper for Bigam's school. Between this paper and the alleged perjury there was a direct connection; that perjury, as charged in the indictment, related to the place and the time, and the persons present, where and when the accused subscribed it. It was expressly alleged that the accused testified concerning it, and that as to particular facts he testified falsely. The fact that such a paper was signed at all was involved in the issue. Its existence and production was the best evidence of that fact. It was, in our opinion, properly received.

The fourth bill of exceptions seems to us of a captious charac-

ter. The possession of the record book, by the jury, could be of no importance to the accused. If difference of opinion arose, as to its contents, it was open in the court to be examined. Immediate access could be had to it. No prejudice to the accused could occur from its remaining in court. There is its place, appointed by law, and we are not clear that a party litigant has any right to demand that it be placed elsewhere for his benefit or for his caprice. We can not consider it error that, in this case, the court refused to make an order for delivering it to the jury.

The first assignment of errors contains no ground for reversing the judgment.

We find nothing in the record to sustain the second assignment of error as a matter of fact. No notice is taken of any refusal to sign a bill of exceptions, or of any judge erasing his name after having signed it. The record only is before us, on this writ of error, and we can examine no allegation, in respect to facts, not embodied in it. The same difficulty occurs in respect to the refusal to grant a new trial on the admission of the prosecuting attorney. We find no such admission in the record. We can not say what would be the effect of it if found in proper form. It is possible there might be no error in refusing to grant a new trial, in a criminal case, even upon the admissions of the prosecuting attorney. This court could only determine that by having embodied in the record, by way of bill of exceptions, the entire evidence given to the jury.

The third assignment of error is in the same predicament with the second. The facts alleged are not before us.

Judgment affirmed.

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216] *Michael Hess v. Jonathan Lupton.

Action for damages consequent on an act innocent in itself, and injurious only in consequence of particular circumstances, the declaration must set out the circumstances showing the wrong.

This is a writ of error reserved for decision in the county of Monroe.

In the second count of the declaration (the first having been withdrawn), the plaintiff declares that the defendant being possessed of a certain dwelling-house, and uninclosed yard and ground contiguous thereto, in the vicinity of a public highway, unlawfully placed thereon a large quantity of fish, brine, fish-brine, pickles, pickle-brine, and other acrid and corrosive substances, in divers open vessels, viz: casks, hogsheads, barrels, kegs, and pails, and continued the same in the said uninclosed ground, from September 1, 1832, until September 1, 1833; and during that time he so negligently and improvidently conducted that divers cattle of the plaintiff, viz: six oxen, etc., entered on the said uninclosed land, and then and there ate, drank, and swallowed the said fish, brine, fish-brine, pickles, pickle-brine, salt, and other acrid and corrosive substances, so that they, viz: the said six oxen, etc., died.

The defendant demurred.

The court of common pleas gave judgment for the defendant upon this count, to reverse which, the plaintiff brings this writ of error.

ARCHBOLD, for plaintiff, insisted that as the plaintiff's cattle were not wrongfully on the uninclosed land of the defendant, he could not place any substance upon his land injurious to them without negligence and liability for the loss; and he cited 29 Ohio Stat. 456, 471; 4 Ohio, 427; Deane *v.* Clayton, 7 Taunt. 489; 1 Stark. Cas. 150, 287; 11 Mass. 127; 1 Camp. 517; 3 Ib. 399; 1 Cowen, 78.

Judge LANE delivered the opinion of the court:

Where an act complained of is innocent of itself, and injurious only from the circumstances under which it is done, those circumstances should be stated in pleading. If one leave an open pit in an uninclosed lot in a town, into which his neighbor's beast falls and perishes, an action lies; but if such an accident happen in a pit left open in a place remote from the haunts of cattle, no suit is sustainable, for the risk of *doing mischief is so small that [217 the exposure is not *negligent*. To show a cause of action in such a case, therefore, it is necessary to set forth in the declaration the situation of the pit; that it was left unsecured in a place where cattle were accustomed to resort. This principle should govern the present case. No wanton or malicious mischief, no intention to injure is pretended. The situation of the place where the nox-

ious substance was left, its proximity to the haunts of cattle, and the risk of injury must be stated more fully than in this declaration, to make a case of liability for negligence.

Judgment affirmed.

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FRANCIS LE CLERCQ AND OTHERS, INHABITANTS OF THE TOWN OF GALLIPOLIS, *v.* THE TRUSTEES OF THE TOWN OF GALLIPOLIS.

Individuals owning lots in a town, adjoining an alleged public square, may sustain a bill in chancery to establish the dedication, and to preserve the public use.

Where land in a town has been dedicated as a public square and used as such, the legislature can not authorize the town corporation to change its character.

THIS is a bill in chancery, brought by five citizens of the town of Gallipolis owning lots adjoining the public square, to assert the property of the inhabitants of the town in it, and to restrain the defendants from converting it to any other use.

In October, 1790, a colony of Frenchmen was introduced into the territory northwest of the Ohio by an association called the Scioto Company, who contracted to sell them lands, including a city, to be laid off near the mouth of the Great Kanawha. As delays occurred in the progress of the settlement, the company stipulated to give each colonist one city and one four-acre lot as a compensation. In December, 1790, the company surveyed for the colony the town of Gallipolis, in its present form, leaving a large unsurveyed tract in the center, being the ground in question, which the colonists designated by the name of "La Place." A kind of distribution of the lots was made among the colonists. "The Place" was occupied by a block-house and some slight erections. The affairs of the Scioto Company soon fell into confusion, so that they could not complete their contracts with the colonists, and to add to their embarrassment, the title to the land on which the town was situate was found to be in the Ohio Company. In 1795, the colonists appointed Messrs. Bureau, Barthlet, and Meigs 218] to negotiate for the purchase, *who, on December 14, 1795, reported to a regular meeting of the inhabitants of the colony the

terms on which the land might be obtained. The colonists accepted these terms by vote, and appointed seven commissioners by ballot to value the lots of the town and ascertain the rights of pre-emption, which arose from occupancy. These commissioners, in the execution of their duties, resolve, "that the public good and convenience, and the interest of the inhabitants, require the streets and the *Public Place* shall remain free, and never be alienated or obstructed on the bank of the river by any kind of buildings." They number the lots, after the old survey, and set a value to each. The lots fronting "The Place" are appraised higher, because they say they are "a source of wealth by their situation," and those more remote are set at a lower price, proportional to their distance from the center. This report, which is made an exhibit in the case, was communicated to the inhabitants at a meeting held on December 17, 1795; the plan of valuation was agreed upon by vote, and was signed individually by all the colonists, the amount of the valuation was collected, and commissioners were appointed to procure the title of the land.

On January 7, 1790, the two particular square miles on which the town of Gallipolis is situate was conveyed by the Ohio Company to Fearing and Meigs, in fee, but "in trust for the inhabitants of Gallipolis, according to their several rights and interests, and agreeable to a plan adopted by the inhabitants of Gallipolis on the 17th of December last." The trustees have executed their trust by conveying the lots to individuals; they have made a plat of the town after the old survey, in which the controverted ground is left open, which plot was acknowledged on December 26, 1796, and has been recorded. No private buildings have been erected on the square except those of a very temporary character, and long since removed. A court-house and a market house now stand upon it. A jail was once erected there, but in 1817, when a proposition was made to rebuild it, the trustees of the town (the present defendants) remonstrated with the commissioners of the county against this proceeding, and declared by vote that "they found of record an express reservation of the public square, as an ornament to the town, not to be alienated." For nearly forty years the ground has been used as a *public square, except [219 so far as the court-house and market house have interrupted this occupation.

By the act of February, 1834, Ohio L. L. 32–120, the president

and trustees of the town of Gallipolis are authorized to survey this ground, lease it for ninety-nine years, and apply the avails to the improvement of the landing. The corporation have taken steps to execute these powers. The defendants show they own lots contiguous to the ground in controversy, the value of which is affected by this disposition, and asserting it was dedicated as a public square for the inhabitants of the town, seek to declare this use, and restrain the defendants from interrupting it.

NYE and BRAZEE, for complainants.

VINTON, for defendants, maintained:

1. The injury (if any) being to the public, the plaintiffs show no right to sue. 6 Ohio, 101.

2. That no dedication was ever made by the proprietors of the town. That the declaration, "that it should remain open," was the act, not of the inhabitants, but of the committee, and unauthorized by their powers. That the "*plan*" spoken of was not a plan of the town, for *that* was made before, but a plan of distribution, and as such was referred to in the deed of the trustees; that the proprietors of the town, at their meeting on the 17th of December, did no act affecting the public ground, but merely ratified the rights of pre-emption and the tariff of prices, found by the committee; that the land, therefore, has never been dedicated to public uses, but remained with the proprietors an undisposed residuum, which either passed to the trustees of the town on its incorporation, or was liable to be devoted, like a highway, to any public purpose, by the supreme authority of the legislature. 4 Pet. 282.

Judge LANE delivered the opinion of the court:

No perticular words or ceremonies, or form of conveyances, is necessary to render the act of dedicating land to public uses effectual. Anything which fully demonstrates the intention of the donor, or the acceptance by the public, works the effect. The beneficial interest in the land was in the colonists since 1780. The 220] legal title was acquired by their *trustees in 1796, and it is convincingly shown that all parties have united in some act of dedication for the use of a public square. The original survey of the town left the ground for this purpose, in conformity to our

habits—in greater conformity to the habits and customs of the people composing the colony; the words "La Place" [the place], by which it is designated on the recorded plat, and by which it has always been distinguished, and to which no other interpretation can be fixed, in this connection, than a public square, or a plat of ground devoted to some public object. The acts of the commissioners, valuing the lots adjoining "La Place" at a higher price, "because it was forever inalienable, and to be kept open," thus furnishing evidence of the object; the ratification by the inhabitants of these acts, in adopting this plan of valuation; the registration of the town plat by the legal owners, in 1796; the uses for thirty-eight years; the general belief of its dedication; the acts of the defendants, resisting the encroachments of the county, and declaring the reservation for this object by vote; all these show conclusively the dedication of the ground for the use of the inhabitants of the town.

The fee of lands dedicated to public objects sometimes passes directly to the corporation for whose use it is intended, and is sometimes held by a corporate town, or by a county, in trust for the uses designated. In the first case, as where land is given to a town for corporate purposes, a vesting by the present statute, 29 Ohio Stat. 351, or where land is acquired by a county by purchase, or where given for county objects, a vesting by section 4 of the act of 1800, 2 Ter. Laws, 43, an absolute estate is held by the corporation, which they may alien, 5 Ohio, 204, and third persons are not permitted to interfere with the management of their agents. 6 Ohio, 101. But when such corporation take as trustees, to hold to prescribed uses, the *cestui que use* requires a vested estate, the enjoyment of which may be obtained in chancery. In this case the land was either vested in the town for the use of the inhabitants by the general acts of dedication, or it passed to the county by the statute, to be held for this use. It has been settled in this court, that where land is dedicated to the use of the inhabitants of a town, one, or more, especially one whose property is affected in value, may enforce the execution of the trust. 6 Ohio, 304. The plaintiffs may sustain *their suit, unless the defendants [221 prove the authority they claim, under the act of the legislature.

Among the inestimable advantages secured by the constitution of Ohio to its citizens, is the inviolability of private property. The power of divesting the owner of his rights is limited by sec-

tion 4 of article 7, to those cases where it is necessary for the public welfare. The transfer of specific property from one individual to another, without pre-existent right, or the forfeiture for a penalty, or the consent of parties, can not be accomplished by direct legislative action. 3 Mass. 106; 11 Ib. 396; 16 Ib. 76, 215. So the franchises and powers held by a private corporation, can not be revoked, unless a forfeiture from misconduct by the company. 2 Mass. 143; 6 Cranch, 88; 7 Cranch, 164; 9 Ib. 43, 229; 7 Cond. 53; 1 Paige Ch. 107; 2 Kent Com. 305, 2 ed. And in public corporations instituted for political or civil purposes, as cities or towns, where no such limitation attaches to the powers of the legislature, in case of a dissolution of the body by a repeal of the charter, the property it holds for others does not become the property of the state; it continues private property, 16 Mass. 76, 215; the trust does not cease when the trustee fails. Co. Lit. 115, a note. If the object of its creation can be attained, the court of chancery will enforce its execution. 9 Cranch, 52. Where circumstances are so changed, that the direction of the donor prescribing the use, can not be literally carried into effect, the legislature or the court, in those cases where general intention can be effected, may lawfully, in some cases, enforce its execution as nearly as circumstances admit, by the application of the doctrine of *cy pres*. 7 Vern. 36, 490; 9 Ib. 405; 1 Vern. 248; 2 Cox, 365. And where the object of the trust wholly fails, the fund does not become public property, but reverts to the donor.

In the case, then, before us, wherever the fee was vested it was held in trust as a public square, for the use of the inhabitants of the town. It was valuable property, appurtenant to the estates of the lot-holders. The statute professes to authorize the defendants to apply the land to a different purpose, without the consent of those interested, from the surmised greater convenience of the citizens. Our course of reasoning has led us to the conclusion, that the act confers upon the defendants no power to divert this property from its original use. Perpetual injunction awarded.

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*JOHN CHENEY v. STATE OF OHIO. [222

Association with horse-thieves, or subsequent confederation to steal horses, not admissible evidence on a prosecution for stealing a specified horse.

THIS cause was reserved in the county of Richland. The plaintiff in error was arraigned below on an indictment for stealing a gelding, the property of one Lucius Doolittle, in the year 1833. To this indictment, he pleaded not guilty; and to support the affirmative of the issue thus joined, the state gave in evidence, under the direction of the court, certain confessions of the prisoner, "that subsequently to the alleged larcency, he and divers other individuals had been engaged in one line as horse-thieves." Also, the pertinent fact, "that defendant was intimate with persons known to be of suspicious character in that respect." Also, the following to prove *the scienter*, to wit: "Particular conversations which the prisoner had with witness in regard to horse stealing," generally. To the admissibility of this evidence, counsel for the prisoner below objected; and on the objection being overruled, took the exceptions on which the present writ of error is predicated.

J. STEWART, for the plaintiff in error.

Judge LANE delivered the opinion of the court:

The testimony admitted, in this case, was altogether inadmissible. The intimacies of an accused person with suspicious or guilty persons do not prove him guilty of any particular crime; neither can a combination to steal horses, formed subsequently to the larceny on trial, be proved to establish that larceny. Evidence to convict a person of a specific offense, must bear upon that offense, and not upon others, or it avails nothing.

Judgment reversed; remanded for new trial.

223] *H. A. SHARP v. E. A. WARD.

Days of grace not allowed upon common notes of hand.

THIS was a writ of error, adjourned for decision here, from the county of Cuyahoga. The object of bringing the case into this court was to settle and publish a rule of mercantile law, respecting days of grace, upon negotiable notes, payable at no particular place. The case was this,

Ward, indorsee, brought suit against Sharp, his indorser, upon a note of hand, payable to an order *one year after date*, and dated June 12, 1830. Payment was demanded, and notice of non-payment given, on June 13, 1831. The court of common pleas of Cuyahoga county held the demand and notice good, and gave judgment for the plaintiff, to reverse which this writ is brought.

Judge LANE delivered the opinion of the court:

The single question presented upon this record is, are days of grace allowed, in this state, upon notes like this? In the absence of legislation, and of decided cases, this depends upon custom, that is, upon the usual mode of transacting the business upon which the controversy arises. In 6 Ohio, 66, this court held that some descriptions of negotiable paper, such as notes payable at banks, are subject to the rules of the general law merchant. Upon such notes, and upon commercial bills of exchange, it is a well-established usage to allow days of grace. In relation to mere ordinary notes of hand, made in the common transactions of life, no such usage is understood to prevail. It is customary to interpret the contract according to its terms, and treat it as requiring performance on the day stipulated. The judgment is in accordance with this usage, and must be affirmed.

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STATE, FOR THE USE OF BARTLET, v. HUMPHREYS.

Suit against sureties in a guardian's bond sustainable without previous liquidation of the amount due from the principal.

ADJOURNED from the county of Washington.

This was an action of debt upon a bond, in which the defendant was surety for one German, appointed guardian of Bartlet. German was dead. The declaration assigned the general breach, besides special breaches, but set forth no *settlement or [224 liquidation, by suit or otherwise, ascertaining the amount of liability of German. The defendant demurred generally.

GODDARD, for plaintiff:

NYE, for defendant.

Judge LANE delivered the opinion of the court:

It has been decided, in this court, that suits against the securities of administrators are not sustainable, before the amount of debts has been adjusted in a suit against the administrator. Treasurer of Pickaway *v.* Hull, 3 Ohio, 225; Stewart *v.* Chapline, 4 Ohio, 101; Treasurer of Montgomery *v.* Kemp, 5 Ohio, 240. Since these decisions, this rule has been incorporated into our statutes with some modifications. Such suits are now sustained upon liquidation or admission of the amount due, by the administrator. 32 Ohio L. 36.

A similar rule of decision has never been applied to other bonds than administrators'. It has been refused in respect to an insolvent's bond, and a clerk's bond. 3 Ohio, 508; 6 Ohio, 150. The statute just referred to, enacted in view of the existing state of the question, confines its provisions to administrators' bonds, and thus sanctions the practice of excluding other bonds from the application of the rule. Considering ourselves at liberty to treat a new case as presenting an open question, we deem it proper to adopt the rule that seems to us most just and convenient. We apply to this bond that rule that holds it absolute upon a breach of the condition, and sustain the suit against the sureties without requiring previous liquidation of the claim against the principal.

225] *JOHN PATTERSON ET AL., ADMINISTRATORS OF MARTIN, v. JOHNSTON ET AL.

A lien on land sold for the purchase money, is preferred to the lien of judgment creditors, without notice.

A mortgage to secure indorsers upon a note contemplated to be discounted at a particular bank, and so expressed in the deed, is valid to secure the same indorsers, though the discount took place in a different bank from the one named, and was subsequently transferred to a third bank, with the same indorsers.

THIS is a suit in chancery, reserved from the county of Belmont. It is brought to settle priorities of lien, to a sum of money, made upon a sale of land under judgment, which by agreement was bought by plaintiffs, to remain in their hands, subject to this adjustment.

In 1806, Posey bought and received a conveyance of one hundred and twenty acres of land from Martin, for which he paid a part, and gave his notes for the residue. Shortly after, Posey became security for Martin, on an injunction bond, and Martin placed the unpaid notes in Jenning's hands, for his indemnity. In 1808, Posey and Martin formed a partnership, to erect and carry on a mill upon the land, one of the terms of which was, that Posey should reconvey one-half the land, and Martin was to indorse the proportional part of the purchase money upon such note. Posey was compelled to pay five hundred dollars on the injunction bond for Martin. He never made a conveyance of the land. In June, 1811, a suit was instituted by Posey against Martin, to adjust the partnership and other matters between them, which was terminated by a decree in 1819, by which two hundred and twenty-seven dollars was found to be due from Posey to Martin, and made a charge upon the land, to be paid in preference to other claims.

In January, 1810, Posey mortgaged the land to Johnston and Hammond, to indemnify them for their indorsement of his note for five hundred dollars. It was the condition of this mortgage to be void on the payment by Posey of "a note for the sum of five hundred dollars, indorsed by them, payable at the Washington Branch of the Bank of Philadelphia." The note, described in

the mortgage, was presented at the branch at Washington, but not discounted. Another note made by the same parties, for the same sum, was presented and discounted at the Bank of Steubenville, which, being unpaid, was prosecuted to judgment in 1816. To pay this judgment, the parties, in 1816, procured the discount of another note, at the Belmont Bank of St. Clairsville, for the amount of principal, interest, and costs; this note was not paid, and a judgment was obtained in 1819, for six hundred and forty-six dollars and fifty-four cents.

In 1815, Caldwell recovered judgment against Posey; the *land was sold in 1823, by the agreement of all parties to [226 this suit, and without prejudice to any rights, and this bill is brought to determine who has the right to the money.

GOODENOW, for Patterson and executors of Martin.

GENIN, for Caldwell.

PECK and HAMMOND, for Johnston and Hammond.

HUBBARD and COWAN, for bank.

Judge LANE delivered the opinion of the court:

Four distinct liens upon the land are presented upon this suit: 1. The lien for the purchase money in the sale in 1808, found due and charged upon the land by the decree of a court of chancery, rendered in 1819, in a suit instituted in 1811. 2. The mortgage to Johnston and Hammond, in 1810. 1. The lien of Caldwell, judgment rendered in 1815. 4. The lien of the judgment in favor of the Belmont Bank of St. Clairsville, rendered in 1818.

The lien for the purchase money is well established against the parties and their representatives, and all claiming under them with notice. The decree charging it upon the land is not necessary for its validity; all who are bound by it in this case are bound from the time of the sale. 5 Ohio, 39; 4 Wheat. 255; Wr. S. C. 356. Although it is a lien in equity only, yet being *specific*, attaching to certain property, it is entitled to a preference over subsequently accruing general liens at law. Bank of Muskingum *v.* Adm'rs of Carpenter et al., decided this term. The judgments, therefore, of Caldwell, and of the Bank of St. Clairs-

ville, must be postponed to this; and it is entitled to a preference over all later rights, except those of a purchaser for a valuable consideration without notice.

The mortgage by Posey to Johnston and Hammond was intended to possess this character. It conveyed the legal estate to a mortgagee, who has the privileges of a purchaser. No actual notice of the equitable lien is shown; no constructive notice arises before the pendency of suit in 1811.

An attempt is made to invalidate the mortgages by denying the right of the mortgagee to apply it to a purpose different from that 227] expressed on its face, viz: to secure the payment *of a note at the bank at Washington, which was never incurred. If a person had been misled by this description, and after due inquiry had advanced money upon, or acquired an interest in this specific land, in the confidence of the non-existence of such a lien, perhaps his rights might be preferred; but a mere general incumbrancer, if he acquires no paramount legal right, occupies the position of the debtor, and holds his interests subject to all the equities which may be exacted against him. It is evident, in this case, that the grantor of this deed intended it as a protection to his indorsers for their responsibility, upon a contemplated loan for five hundred dollars; it is permitted in equity to trace this debt in favor of securities wherever contracted, and under any form it may assume in the usages of business, and attach the security to it. 4 Johns. Ch. 55. The judgment creditor has no reason to complain of rights infringed by this rule, for the mortgage transferred the the legal estate and defined the extent of the burden it imposed upon the land, differing from the case in the New York Reports, where a mortgage for three thousand dollars was recorded as for three hundred dollars, and held to incumber the estate no farther; it was, then, of no moment to the later incumbrancers who held this lien, so long as it did not transcend the original amount. Since then it is shown that the debt contracted at the Bank of Steubenville, and afterward transferred under bank usages to the Belmont Bank, was intended by the parties to be secured by the mortgage, and that the mortgage was taken by the grantees without notice of the non-payment of the purchase money; it is the preferable item. The lien for the purchase money is to be next satisfied; lastly, the liens by judgment in the order of their dates.

JOSEPH SCOTT *v.* RICHARD DOUGLASS.

A party tracing title through a regularly executed deed of conveyance is concluded by its recitals.

THIS was a bill in chancery, from Ross county, to review a decree in the Supreme Court in bank, made in December, 1831, as reported in 5 Ohio, 199 where the facts are stated.

T. SCOTT and LEONARD, for plaintiff.

*SWAN and DOUGLASS, for defendant. [228

Judge LANE pronounced the opinion of the court:

The title of Douglass depends upon the validity of a sale of land, which Kerr held in possession under an execution against him. Scott holds an assignment of the equitable estate of Kerr, and a conveyance of the legal title from the trustee of the heirs of Massie; and he insists that as Kerr had an equitable interest only in the lands at the time of the judgment, a sale under execution passed no right at law.

But it is too late to question that a man, in possession of lands, has an interest which may be sold by process of execution at law. We do not attempt to define the extent of this interest; something passed, and the judgment debtor is not permitted to dispute the estate of him who chooses to take it as his property. 2 Ohio, 225; Wright's S. C. 117, 362; 18 Johns. 84; 5 Ohio, 55.

The counsel for Scott assert, that admitting a title passed by this sale, it was, at best, the bare legal right of possession, which left the equities of Kerr unaffected; that as these equities have long since passed to Scott, he may enforce them against the holder of the legal estate. It is plain that a mere equity can not be sold by process at law. 1 Ohio, 314; 18 Johns. 94. These facts may raise the question, whether the equity of a person in possession be not so connected with his legal estate as to pass by a sale of the latter, even under execution, so that it may be enforced by the purchaser. The determination of this point is not necessary in this case. The peculiar advantage of Douglass' position, in protecting his title, consists in the right to fasten upon

Scott the disability of contesting the legal title of Kerr. If Kerr can not deny his estate; if Scott, holding from Kerr, is subject to the same disqualification, his better equities are unimportant; the legal estate of Douglass is paramount to these rights, and the statute authorizes him to quiet his possession by this bill. A renewed examination of the principles, which guided us before, has confirmed our opinion in their correctness; and Scott can not evade the conclusion to which we were led, except by tracing his title from some other source.

This is attempted to be done under the deed from Wallace; and if that conferred a title without any relation to Kerr or Montgomery, he would not be affected by the admissions they 229] *have made. But the rights arising from that deed were peculiar. The legislature, by private statutes (18 Ohio Stat. 93; 19 Ib. 80), invested Wallace with power as a trustee to convey the lands, which Massie in his life had become bound to convey, "to the person holding the evidence of the claim legally obtained, or otherwise entitled to such conveyance." I have heard it doubted, if the legislature could confer such authority. But waiving this objection, he possessed no power to transfer a distinct, independent title; unless he conveyed to the holder of the equity, his deed was void. The defendant makes the title to the equity from Kerr, and the deed from Montgomery to Kerr is the evidence of his equity. Since, then, he must trace his title through that deed, he can not shake off his privity with its recitals.

Bill dismissed.

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NICHOLAS HEADINGTON v. HANNAH NEFF, FOR THE USE OF CONRAD NEFF.

Security, who has given notice in writing to the creditor to proceed against the principal debtor, must set forth the fact in a plea; he can not otherwise avail himself of it as a defense at the trial.

Upon a demurrer judgment is always given against the party that commits the first fault in pleading.

RESERVED in the county of KNOX.

The action is a debt on a sealed note. The declaration contains

but one count, in which the defendant in error, in the court of common pleas, declared that the plaintiff in error, on August 25, 1819, at Knox county, by his certain writing obligatory, sealed with his seal, etc., acknowledged himself to be held, etc., to the defendant in error, in the sum of forty-nine dollars and twenty-five cents, to be paid to her twelve months after date.

The defendant in error pleads: 1. *Non est factum;* 2, 3, and 4. Special pleas substantially the same, setting up as a defense that the said note on which the suit was brought was a joint and several undertaking, in which one George Ogg was *principal*, and the plaintiff in error and others *sureties;* and that after the obligation became due, to wit: on August 25, 1821, at Baltimore county, in the State of Maryland, to wit: at Knox county aforesaid, he notified and urged the defendant in error to proceed immediately and collect the money, and that she neglected and refused to do so; that the principal debtor was, at that time, solvent and able to pay the money, and payment might have been obtained of him; but that he afterward *became insolvent, and the defendant [230 in error being now unable to obtain payment of the principal, seeks to recover the amount of said obligation of the plaintiff in error.

There is also a fifth special plea of the statute of Maryland, limiting the cause of action to twelve years' standing. This plea avers that the parties, *at the execution of the said contract*, were both residing in the State of Maryland, and that the action was not commenced within twelve years after the execution of the said note, nor within twelve years after it became due.

To the second, third, and fourth pleas the defendant in error demurred specially, and assigned, among others, as cause of demurrer, that said pleas did not aver that the *notice* given by the plaintiff in error to the defendant in error, to prosecute the principal, was in *writing*.

To the fifth plea the defendant in error replied that the matters therein contained were not true; said note was not executed within the State of Maryland, and this he prays may be inquired of by the country. To this replication the plaintiff in error demurred specially. The court of common pleas sustained the demurrer to the second, third, and fourth special pleas, and the demurrer to the replication to the fifth plea, and, at the next term, neither party requiring the intervention of a jury, the cause was submit-

ted to the court, and judgment given to the defendant in error for the amount of the note, with interest and costs.

DELANO, for the plaintiff.

HALL, for the defendants.

Opinion of the court, by Judge WOOD:

The plaintiff contends the court of common pleas erred in sustaining the demurrer to the second, third, and fourth special pleas, and that its proceedings must be reversed. This is the principal error he has assigned, and the only one on which he appears to rely. We do not know the reason that court gave for its decision, and it would be time misspent to inquire, for we do not reverse its decision, because an erroneous reason may be given for it, so long as the judgment itself is, in our opinion, correct.

The declaration avers the note was executed in Knox county. 231] *The pleas under consideration do not controvert this fact. No question, then, as it is sued in our courts, can arise as to its not being subject to be controlled by our laws. If a party in Ohio will screen himself from liability, because he was *surety*, and notified the creditor to proceed against the principal debtor, *such notice must be given in writing*. 29 Ohio Stat. 461. Jenkins *v.* Clarkson, decided the same question at the present term. Counsel say, however, that it may be shown on the trial that such notice was in writing, but it is unnecessary to aver it in the plea. We entertain a different opinion. When a promise is required to be in writing, it may be declared on, generally, in a declaration; but a plea must be more certain, and show the promise in writing, or such plea will be bad on special demurrer, and such is the authority of Chitty. 1 Chit. Pl. 213, citing 1 Saund. 276 a, n. 2. The demurrer was, therefore, properly sustained to the special pleas.

The demurrer to the replication to the fifth special plea is now to be considered, and it may be truly said to contain scarcely one requisite to make a good replication. It neither denies, confesses, avoids, nor estops the plaintiff in error from setting up any one fact the plea contains. 6 Dane's Abr., chap. 180. It has no legal commencement. It is more general than the declaration it is intended to sustain, and is a proper answer to the plea in no one particular. It is most clearly *bad*, and the demurrer to it is correctly

sustained, *provided* the *plea* itself is good; but the demurrer to the replication opens the plea for inspection, and judgment must be given against him who committed the *first* fault in pleading. This plea of the statute of Maryland, in bar of the action, avers that the parties resided in Maryland, *at the time of the execution of the contract*, but does not aver that they resided there when the cause of action accrued. If, then, the defendant had left that state before the note became due, and this the plea does not negative, the statute of Maryland would be no bar to the action. The plea, then, is *bad*, and the court of common pleas *erred* in sustaining the demurrer to the replication, for the replication is good enough for the plea. The court, on this demurrer to the replication, should have overruled the plea, and its decision would have been technically correct. The court of common pleas has, however, given judgment for the defendant in error, and the judgment is *right*, *though the [232 reason assigned for it may be *wrong*. The judgment of the court of common pleas is affirmed with costs.

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THE COMMISSIONERS OF GALLIA COUNTY *v.* ABNER J. HOLCOMB.

The commissioners of the county can not maintain an action, in their capacity as commissioners, against individuals who may carelessly or willfully destroy roads or bridges.

RESERVED in the county of Gallia.

It is stated in the declaration, that the plaintiffs, as commissioners of Gallia county, were possessed of a certain wooden bridge of the value of five hundred dollars, then lawfully being over Raccoon creek, in said county, on a road leading across said creek, at a place called Gray's mills, to wit: at Gallia county aforesaid; and afterward, to wit: on May 1, 1832, at Gallia county aforesaid, said defendant, by himself and servants, was navigating certain rafts down said creek, from a point above said bridge, and did then and there, in navigating said rafts, throw down, demolish, ruin, and destroy said bridge, and the same was, by reason thereof, taken away by the current of said creek, and wholly lost, to wit, etc.

To this declaration, the defendant demurred generally, and the plaintiff joined in demurrer.

VINTON and NYE, for the defendant.

BRAZEE, for the plaintiff.

Opinion of the court, by Judge WOOD:

Are the plaintiffs entitled to recover on the case made in the declaration? They are a corporation, and claim to maintain the action in their corporate character. Can they do so? Corporations, whether strictly or *quasi* such, are limited to the exercise of those powers which are specifically conferred on them by law. The corporate franchise, being restrictive of individual right, can not be extended beyond the letter and spirit of the act of incorporation. 2 Kent's Com. 226; 1 Pet. Cond. Sup. C. U. S. 374. Counties, townships, etc., are *quasi* corporations, 7 Mass. 169; and instead of having more enlarged powers than a corporation proper, they are, it is said, more restricted and liable to responsibilities from which corporations proper are exempted.

233] *Section 7 of the act establishing boards of county commissioners (3 Chase's Stat. 1749) confers upon them power to sue and to be sued, to plead and be impleaded, and enumerates a class of cases in which they may sustain an action, as follows: "And they are hereby authorized and required to ask, demand, and recover, by suit or otherwise, any sum or sums of money or other property due to such county, on account of advances made by them on any contract, with any person or persons, for the erection or repairs of any public building or bridges, or any other contract which, by the provisions of this act, they are authorized to enter into; and, in like manner, to sue for and recover in money the value or amount of any labor or article of value subscribed instead of money, to aid in erecting or repairing public buildings or bridges, when such labor or article of value upon their requisition shall not have been performed, delivered, or paid in a reasonable time, and the money, if recovered in either of the above cases, shall be by them paid into the treasury of the county," etc. The case made in this declaration is not, in express terms, provided for in this statute. The inquiry, then, is, can it be necessary as an incident to the very existence of this *quasi* cor-

poration, or to the complete discharge of all the powers, duties, and obligations conferred upon it by law, that it should have the authority to sustain an action for the willful or negligent destruction of a public bridge; for where such necessity does not exist, a power not granted in express terms can not be conferred by implication. 4 Pet. Con. S. C. U. S. 543.

Section 10, page 1799, of the same statute, authorizes the commissioners to "make any necessary order or contract in relation to the building, finishing, furnishing, or repairing the public buildings, poor houses, or bridges, the improvement or inclosure of public grounds, the maintenance and support of idiots or lunatics, or the expenditure of the three per cent. fund, within their counties." In case of violation of any such contract by the obligor, the complete performance of their duties creates the power *ex necessitate* to sue; and in the absence of the express authority conferred by section 7, it would necessarily be implied. These cases have, if any, but a remote connection with trespasses or injuries committed on the public property. It can not be claimed as necessary to complete a contract for building a bridge that the commissioners *should have power to sue for [234 its destruction, after it is once erected; and unless such power is expressly given by the act, is necessary to the complete performance of some duty conferred upon them by law, or is incidental to their very existence, it can not be exercised. The county commissioners have neither the property, possession, nor right of possession in a public bridge. They have no authority nor control over it, even for the temporary purpose of repair. The most they can do is to appropriate money from the county treasury, in certain cases, and enter into a contract to build or repair a public bridge; but when built or repaired, the possession and control are in the inhabitants of the road district, under the direction and supervision of the supervisor. 3 Chase's Stat. 1857, sec. 9. There is far more reason for saying the supervisor or the inhabitants of the road district may maintain the action for an injury to the road or bridge within his district, than to say such right of action is vested in the plaintiffs. The statute for the punishment of certain offenses therein named (Chase, 1731), provides for the security of bridges by imposing a penalty of fine and imprisonment on such as willfully and maliciously destroy them; but no remedy seems to be given by civil action, either to the commis-

sioners of the county or any other person. Unless, then, some person can be found who has either that general or special property in a public bridge that will enable him, on common law principles, to sue for an injury to it, no action can be maintained. Whether the law has provided that person it is not necessary to decide, but it is clear to us that the plaintiffs have not that power.

It may be said, however, that the declaration avers possession in the plaintiffs, which is admitted by the demurrer, and gives the plaintiffs, for all the purposes connected with this case, a right of recovery. The answer is, a demurrer only allows what is well pleaded, and the case made shows, as the commissioners of the county, the plaintiffs have, under the law, no possession.

The demurrer is sustained.

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235] *James Collier, Commissioner of Insolvents, for the Use, etc. v. Joseph Johnson and others.

Under the law for the relief of insolvent debtors, applicants having property to surrender, are required to give bond to the commissioner. If the applicant have no property, it is discretionary with the commissioner to require a bond, or grant the application without it. In such case, the penalty of the bond must not exceed two hundred dollars.

Bond to the commissioner by applicant for the benefit of the insolvent law is good, if the condition is substantially in conformity with the law.

Reserved in the county of Greene.

This is an action of debt upon a bond executed by the defendants to the plaintiff, as commissioner of insolvents for the county of Greene, and the declaration contains several counts, which it is unnecessary to specify.

The defendants, after craving oyer of the bond and condition, pleaded the general issue, and gave notice of special matter to be given in evidence under that plea.

The bond was executed on February 12, 1833, for the penal sum of fifteen hundred dollars, conditioned as follows, to wit: "Now, if the above-named Joseph Johnson will be and appear before the

court of common pleas, at the court-house in Xenia, on the 29th day of April next, then and there file his petition and make application to said court for a final certificate of his insolvency, and obtain the same, and pay the costs of this his application, and answer to said court such other questions as may be put to him touching his insolvency, and abide the order of said court, and not depart without leave, or deliver up his body into the custody of the sheriff of said county in case of a failure to obtain a final certificate, then this obligation to be void and of none effect, otherwise to be and remain in full force and virtue in law."

The case was submitted to the court upon an agreed statement of facts, taken in connection with the bond itself, which agreed statement of facts is as follows:

"It is agreed, by the undersigned, attorneys for both parties, that the cause of action set forth in the several counts of the declaration filed in this suit, arises out of a bond which the defendants made to the plaintiff, to enable the defendant, Joseph Johnson, who was an applicant to the plaintiff, as commissioner of insolvents for the county of Greene, to obtain a certificate of insolvency. That said Johnson, before and at the time of his application to the commissioner, was under arrest and in the custody of the sheriff of the county of Greene, by virtue of a writ of *capias ad satisfaciendum* duly issued on a judgment at law, rendered in the court of common pleas for Greene county, in an action, being a civil suit wherein Newell and Campbell were plaintiffs, and Stipp and the said *Johnson were defendants. That the [236 bond of the defendants in this suit was made on the requisition of the plaintiff, as commissioner, and was given to obtain the discharge of Johnson from his then arrest, and a final certificate of his insolvency. And that if the law is with the plaintiff, then the court may render judgment for the penalty of the bond and for costs; but if the law is for the defendants, then judgment may be entered for them against the plaintiff for costs to be taxed." Which agreement was signed by the attorneys of both parties.

A. HARLAN and B. CLARKE, for the plaintiff, cited sections 8, 13, 14, and 17 of the act for the relief insolvent debtors, 29 Ohio Stat. 329; 1 Ohio, 170; 2 Ohio, 277; 3 Ohio, 103.

They insisted that the bond was substantially in accordance with

the statute, but if not good as a statutory bond it was good as a bond at common law.

J. ALEXANDER, for the defendants, cited Tidd's Pr. 960; 15 Johns. 259–260. He also referred to the statute, and insisted that the bond was void, inasmuch as it did not conform to the statute in its condition. The condition requires that, upon failure to obtain a certificate of insolvency, Johnson should surrender himself to the sheriff. This is not in accordance with the statute, but is in restraint of liberty and therefore void.

HITCHCOCK, J., delivered the opinion of the court:

From the manner in which this case is submitted to the court, two questions present themselves for consideration; and from the view we take of the subject, these two questions alone are necessary to be decided:

1. From the circumstances disclosed, was it proper for the commissioner of insolvents to require of Johnson a bond; or, if a bond was required, was it proper to require a bond in the sum specified in the case before the court?

2. If it was proper for the commissioner to require such a bond is the condition in conformity with the law?

Both these questions are involved in considerable difficulty, and it has not been without much labor that the court have been able 237] to arrive at a satisfactory conclusion with respect *to them. This difficulty grows out of the loose phraseology of the act for the relief of insolvent debtors.

Section 7 authorizes any person desirous of having his body exempt from liability to imprisonment for debt, who shall have resided two years in the state, and six months within the county where the application is made, to apply for the relief specified in the act. 29 Ohio St. 330. Section 8 refers to those who are in custody of the sheriff, upon civil process, and authorizes them, whether residents of the state or not, to make a similar application. It is unnecessary here to be more specific as to the course of proceeding. It will be remembered, however, that when Johnson made application to the commissioner, he was in the custody of the sheriff, and of course within the letter of section 8. By section 14, applicants under section 7 are required to give bond to the commissioner, with surety to his acceptance, in any sum

required by him, not less than two hundred dollars, conditioned as in that section prescribed. In section 17 it is provided, "that the commissioner may give such certificate as is hereinafter provided for, to any person, who, being in the custody of an officer, shall have made application to him, in the manner provided in section 8 of the act, without requiring any bond of such applicant; if the commissioner shall be satisfied that the applicant *has no property of any kind;* where said applicant shall have complied with the foregoing provisions of the act, or the commissioner may require the applicant to give bond with surety, in the manner provided in section 13, in any sum not exceeding one hundred dollars, conditioned as is provided in said section." These, it is believed, are the only parts of the law requiring bonds upon the first application. It is not a little singular that, in this section, reference should be made to the 13th, as specifying the manner of giving bonds. Section 13 is upon a subject entirely different. It relates to the form of the oath to be made before the commissioner, when application is made under section 8. It should have reference to section 14, and we must so consider it, if we would carry into effect the provisions of the law.

Take this section 17 literally, and it authorizes the commissioner, where the applicant is in custody, and "*has no property of any kind,*" to require of that individual a bond with security, before he gives him a certificate; while, if he has *property, the [238 commissioner can neither require of him a bond, nor can he give him a certificate. Or, perhaps, it would be more proper to say, that if the individual "*had no property,*" the commissioner might retain him in custody until he should give the bond; but if he had property it would be the duty of that officer to give him the certificate without bond, relying upon his own personal responsibility, and his naked promise to comply with the other requisitions of the act.

Such could never have been the intention of the law. It would be absurd. And a careful examination of the section will show that such could not have been the design of the legislature. In this section the legislature proceed upon the hypothesis that by the several provisions of the law, all applicants are required to give bonds. And here they extend to a particular class of debtors a privilege. Where the debtor "*has no property of any kind,*" it is discretionary with the commissioner to give him a certificate,

without requiring any bond. But if he does require any, it shall be in a sum not exceeding two hundred dollars. This section was evidently intended to apply only to this class of creditors.

There is no other way to carry into effect the manifest intention of the legislature, than by supposing that all cases of application under the act are covered by the provisions of section 14, and by giving to section 17 the effect to exempt particular cases from these general provisions. It does not appear that Johnson was of that class of debtors provided for in this section, and, therefore, it was proper for the commissioner to take from him a bond, with security, in such amount as to him seemed proper, provided the sum was "not less than two hundred dollars." No objection to this bond can be sustained, on the ground that it was taken in an improper state of case, or that the penalty is too great in amount.

The next question to be considered is, whether the condition is in conformity with the law.

In section 14 of the law already referred to, it is required that the bond given to the commissioner, and which shall, in all cases, be in a sum not less than two hundred dollars, shall be "conditioned that such applicant shall appear in the court of common pleas of the county, at such time as the commissioner shall return copies to said court, as hereinafter provided, and that the said ap-
239] plicant shall then and there pay *the costs of his application, and, in all respects comply with the requisitions of this act." 29 Ohio Stat. 331.

It is true that the condition of the bond, in the case under consideration, is not literally according to the form prescribed in the statute, but if it is substantially the same it is sufficient. 1 Ohio, 170; 3 Ohio, 103. Inasmuch, however, as this bond is one required by the statute, if the condition varies from the statute, by imposing upon the obligors anything more onerous than is required by the statute, then the bond is void, and can not be enforced. This we take to be a well-settled principle of law. At least it can not be enforced as a statutory bond. Whether it could be as a common law bond, we do not now undertake to decide.

Let us, then, take this condition and compare it with the condition required by the statute in similar cases. This bond is conditioned, in the first place, that the "above-named Joseph Johnson will be and appear before the court of common pleas on the 29th day of April next." The corresponding part of the condition

specified in the statute is, "that the applicant shall appear in the court of common pleas of the county at such time as the commissioners shall return copies to the said court." Is here any material variance? By section 26 of the before-cited act, it is made the duty of the commissioner to return copies of the several schedules, etc., on or before the first day of the next term of the court of common pleas of the proper county, provided fifteen days intervene between the day of making the application and the term of the court.

The application, in this case, was made on the 12th day of February, and the next succeeding term of the court of common pleas commenced on the 29th day of the next succeeding April. Here was the intervention of the fifteen days. And it was the duty of the commissioner to return his copies on or before the 29th day of April. On this day the applicant could be bound by law to appear before the court. The only variance between the condition of this bond and that prescribed is, that by the condition of the bond a particular day is specified on which the applicant is to appear before the court, which is the very day on or before which the commissioner was, by law, bound to return his copies; whereas, the condition prescribed by statute is, that the applicant should appear in the court of common pleas "at such time *as the commissioner should return copies to said court." [240 There is, in this part of the condition, no material variance. 3 Ohio, 103.

The condition then proceeds, "and then and there file his petition, and make application to said court for a final certificate of his insolvency and obtain the same." By the condition specified in the statute the applicant is to "file his petition," but nothing is said in express terms about his applying for a final certificate or obtaining the same, although a part of the condition therein set forth is, that "he shall, in all respects, comply with the requisitions of the statute." The great, the leading object of the whole proceeding is to obtain a final certificate. For this purpose the petition is filed, and if "the requisitions of the statute" are complied with a certificate will be obtained. And there can be no doubt that if the applicant fail to obtain this final certificate, a bond, conditioned precisely in the words of the law, would be forfeited. The only difference, then, between the condition in the bond and that set forth in the statute, so far as this part of the

condition is concerned, is, that in the former, particular acts to be performed are stated; acts which the law requires to be performed; while in the latter, the condition is general. He shall, "in all respects, comply with the requisitions of the statute." In this part of the condition there is no substantial variance.

The condition next proceeds, "and pay the costs of this application, and answer the said court such other questions as may be put to him touching his insolvency, and abide the order of the court, and not depart without leave." This is substantially like the statute, and so far, if the condition specified in the bond is not in the words of the law, the legal effect is the same, and, of course, there is no material variance.

But there is still, superadded to the condition of the bond in this case, a further clause, to which there is nothing in the statute corresponding. It is in these words, "or deliver up his body into the custody of the sheriff of said county in case of a failure to obtain a final certificate." A clause like this was required by the insolvent law of 1824, but is not by the law of 1831, now in force. If this clause adds anything to the duty of the obligors; if it makes it more difficult for them to perform their undertak-

241] ing, the bond is void, and payment *of the penalty can not be enforced. It will be observed that this part of the condition is in the alternative. Expunge this clause, and in order to save the penalty of the bond, it would have been necessary for Johnson, the applicant, to have complied with all the requisitions of the law, and to carry into effect his application by procuring a final certificate. Such, too, would have been the case had the condition of the bond been in words like the condition prescribed in the statute. But retain the clause and the penalty of the bond might have been saved, although the requisitions of the law had not been complied with. It would be at the option of Johnson either to comply with these requisitions, or in failure thereof, to surrender himself into the custody of the sheriff of the county. In either event the bond would have been saved. I am aware that it is urged by the defendant's counsel that the sheriff would here have no power to retain him in custody. If it be so, and we are not disposed to controvert the position, it makes the case still stronger against the defendants. Johnson might have delivered himself into the custody of the sheriff, and if that officer had no authority to detain him, he must have gone at large. Still, the alternative

part of the condition would have been complied with and the bond saved. This superadded clause, then, was altogether more favorable to the obligors than would have been the condition without it, and it would be unjust to permit them to avail themselves of the fact of its introduction to defeat the bond itself.

In the opinion of the court, it was proper for the commissioner of insolvents to require a bond upon the application of Johnson; and further, that the bond which was by him taken is obligatory upon the obligors. And inasmuch as Johnson neither complied with the requisitions of the law, for the relief of insolvent debtors, nor surrendered himself to the custody of the sheriff, according to the condition of the bond, judgment must be entered against the defendants for the penalty of the bond.

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*John J. Cooper v. The Warren Canal Company. [242

Upon an appeal from the adjustment of damages by arbitrators, under the act incorporating the Warren Canal Company, the cause must be proceeded in by proper pleadings and an issue to a jury, as in other cases. The declaration should be as a special action in the case.

Reserved in the county of Warren. This case was certified into this court from the court of common pleas of Warren county, on the ground that there was not a competent number of disinterested judges in that court to try it. It was brought into that court by an appeal from an award of arbitrators, made pursuant to the act to incorporate the Warren County Canal Company.

The declaration is in case, and sets forth, "that the said John J. Cooper, long before and at the time of the passage of an act of the legislature, hereinafter mentioned, and since, has been, and still is possessed of a certain tract or piece of land in the county of Warren aforesaid, and being so possessed and having a right to the use, benefit, and advantage of said land, the Warren County Canal Company," by authority of an act of the legislature of this state, entitled "an act incorporating the Warren County Canal Company," passed February 22, 1830, dug and constructed a canal for the purposes of navigation,

by which, etc., and by form and effect of the statute aforesaid, the defendants became liable to pay damages to those who sustained injuries by the location and construction of said canal, etc.; and which said canal, after the passage of said act and before the commencement of the suit, to wit: on September 25, 1834, in the county aforesaid, dug, constructed, and carried through the land aforesaid of the said John J. Cooper, in the county aforesaid, by occasion of which, etc., the land aforesaid of the said John J. Cooper, which before was valuable and of convenient form, is cut, divided, and thrown into inconvenient form, and thereby rendered of much less value, and a great part thereof, to wit: ten acres, which before was valuable and productive, is covered and occupied by said canal, so that it is totally lost to the said John J. Cooper, and a great part thereof, to wit: ten acres, adjoining and contiguous to said canal and through the banks thereof, is so overflowed and drowned, that the said John J. Cooper has totally lost the benefit and profit of the grass and corn thereon growing, and the said land is become totally barren, unproductive, and of no value, although before it was 243] *productive and valuable," etc., and concluding, to the damage of the plaintiff of one thousand dollars.

To this declaration there is a general demurrer.

A. Brown, for plaintiff.

Williams and Collett, for defendants.

Judge Hitchcock delivered the opinion of the court:

In the consideration of this case, the principal, if not the only difficulty is in giving construction to a provision in the law incorporating the Warren County Canal Company. Section 8 of this act provides, "that whenever any lands, waters, or water-mills, shall be taken for the construction of said canal, or any of its feeders, or works connected with it, and the same shall not be given or granted to said corporation, and the proprietor or proprietors do not agree with said corporation as to the compensation to be paid therefor, it shall be lawful for the person or persons claiming compensation as aforesaid, to select for themselves one arbitrator, and the said corporation shall also select one arbitrator, and the two thus selected shall take to themselves a third, who

shall award as arbitrators between the parties and report the result to the said parties in writing; from which said award either party may appeal to the court of common pleas of their county in which said lands, waters, or materials may be situate, and in all cases where compensation shall be claimed for lands or waters, it shall be the duty of the arbitrators, or the court, to estimate any advantage which the location and establishment of said canal may be to the person or persons claiming such compensation; and such advantage, if any, shall be set off against the compensation so claimed of said corporation; and said appeal, when taken, shall in all respects proceed as appeals in other cases to said court, and be brought into said court by filing the award with the clerk of the court, whose duty it shall be to enter the same on his docket, setting down the person or persons who claim compensation as plaintiffs, and the corporation as defendants." 28 Local L. 126.

This is the only provision in the laws for making compensation to those who may be injured in consequence of the canal passing through their lands, or by having materials taken from them for its construction. Similar provision is made in *other acts [244 of incorporation, and it is necessary to give such a construction if it can be done consistently with the wording of the act as shall do right and justice to all concerned.

Under this section arbitrators were selected by the parties, who made their award, from which an appeal was taken to the court of common pleas. So far, there is no difficulty. But the appeal having been taken, how is the case to be disposed of in court? No course of proceeding is pointed out. It is made "the duty of the arbitrators of the court" as the case may be, "to estimate any advantage which the location and establishment of said canal may be to the person or persons claiming compensation," and set off such advantage against the compensation claimed. In other words, it is the duty of the arbitrators, and of the court acting upon this subject, to take into consideration the advantage conferred upon the individual as well as the injury inflicted by the construction of the work, and if the balance be found in his favor, then an award is to be made accordingly. From this part of the section, it would seem to have been the intention, that the court should merely review the proceedings of the arbitrators, and correct them if found necessary. Such construction, however, would deprive the parties of the constitutional right of trial by jury, and

of course ought not to be adopted, if it can properly be avoided. Nor would it in fact be justified by the subsequent part of the section.

The section next provides that the appeal when taken "shall in all respects proceed as in other cases." And it is made the duty of the clerk to enter the case upon the docket, setting down the person claiming compensation as plaintiff, and the corporation as defendant. The phrase "shall in all respects proceed as appeals in other cases," is not very definite. If there were uniformity of proceeding in all cases which came before the court of common pleas by appeal, the intention would be perfectly clear. But it is not so. An appeal is allowed to that court from an inquest of lunacy, 29 Ohio L. 328; from the decisions of county commissioners, 29 Ohio L. 269, 356, 364; in certain contested elections, 29 Ohio L. 53; and from the decisions of township trustees relative to township roads, 29 Ohio L. 366. In these cases, the manner of proceeding on the appeal is prescribed, but that particular manner could not be followed in a case like the one before the court. But 245] by far the most numerous class of appeals *which come into the court of common pleas are from justices of the peace. And generally, if not uniformly, after the case is brought into that court, the proceedings are according to the course of the common law. It is treated substantially as if instituted in that court. The provision, that the case should be docketed, and that the clerk should set down one of the parties as plaintiff, and the other as defendant, would seem clearly to indicate, that in saying the appeal "shall in all respects proceed as in other cases," the legislature must have had reference to appeals from justices of the peace. Such we believe to be the proper construction of the section. The proceeding before the arbitrators is in the nature of process to bring the parties before the court. If they are satisfied with the award, it is well. If not, either party may appeal, and that, too, without bond. And when in court, the proceedings must be the same as in other common law cases. An issue must be made up to be tried by the court and jury, according to the nature of that issue. If the issue is decided in favor of the plaintiff, then the benefit which he derives from the location and construction of the canal, must be ascertained, and set off against the damages sustained, so far as is just and equitable.

Having settled the construction of the statute, the next question is as to the sufficiency of the declaration.

The plaintiff has declared in case. To this we see no objection. He has stated his cause of action with all necessary precision. If the facts stated are true, he is entitled to damages. The form of the declaration is somewhat novel, but the case itself is equally so. From anything we can discover, there is sufficient stated to put the defendants upon their defense.

Leave is given to the defendants to withdraw the demurrer, and the case is remanded to the county of Warren for plea, and in failure of plea, for an inquiry of damages.

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*The State of Maryland, for the Use of Charcella Shipley, v. Elias Shipley, impleaded with Ezekiel Shipley and Peter Shipley. [246

To an action of debt on an executor's bond, executed in the State of Maryland, the statute of limitations of that state is a good plea in bar in Ohio. If the act has began to run in Maryland, it continues to run in Ohio.

This cause was reserved in the county of Knox.

The action is on a bond executed by the defendants on December 6, A. D. 1817, at Baltimore, in the State of Maryland. The penalty is three thousand dollars. It was executed by the two first-named defendants as principals, and by the last as security, and was conditioned for the faithful discharge of the duties of the principals, as executors of the last will and testament of Charles Shipley, deceased.

It is averred in the declaration, that at Baltimore, on January 1, 1818, to wit: at Mount Vernon, etc., two thousand dollars came to the hands of the said executors, as assets of the estate to be distributed; that the said Charcella, for whose use the suit is brought, is the widow of the testator, and entitled by will to five hundred dollars, which was adjudged to her, on settlement, by the orphans' court of Baltimore county, on January 10, 1820; that she has often requested the executors to pay the same, and assigns the non-payment as a breach of the condition of the bond.

The defendant, Elias Shipley, pleaded specially, in bar of the action, the statute of limitations of Maryland, passed at a session of the general assembly of that then province, commenced on July 10, and ended on August 8, 1729, entitled "an additional and supplementary act to the several acts for the administration of justice in testamentary affairs," and still in force. By this statute, it is enacted, *inter alia*, that all actions upon administration and testamentary bonds shall be commenced within *twelve years after the passing of the said bond*, and not after.

The plea avers that all the parties to this suit, at the execution and passing of this bond, resided in the State of Maryland, and that the action was not commenced within twelve years next thereafter. To this plea, there is a general demurrer and joinder.

Opinion of the court, by Judge WOOD:

For all the purposes connected with our inquiry, the facts set up 247] in the plea are admitted by the demurrer. *Is the plea *a bar to the action?* At the execution of the bond, all the parties to it, and to this suit, resided in the State of Maryland, and the statute began to run the moment the bond was delivered. The terms of the act can not be misunderstood. The action is limited to twelve years after the bond shall be *executed and passed.* The time when the cause of action accrued is wholly immaterial. Nothing is shown to except this case from the operation of the general rule, that when a statute of limitation once commences, it continues to run; and as it commenced on December 6, 1817, and no action was commenced for *more than twelve years next thereafter*, we are of the opinion the right to sue in the State of Maryland is barred, as shown by the plea.

One question remains. If the action is barred in Maryland, does it continue barred if a suit be instituted in Ohio? In the interpretation of a contract, we are governed by the *lex loci;* in enforcing it, by the *lex fori;* and the statute of limitations of the state where the suit is brought, it is settled, is the only one which can be pleaded in bar of the suit. Without the aid of the statute of Ohio, the plea of the statute of Maryland could not be sustained. The statute of Ohio, however, provides (vol. xxix, 315, sec. 4), "That in all actions founded on contract, either express or implied, made between persons residing without this state at the time such contract was made, and which are, or hereafter may be, barred by

the laws of the state, country, or territory where made, shall be and continue barred when brought in any court of this state."

If the action is barred in Maryland, as we have already seen, the statute of Ohio permits the statute of limitations *there* to be plead in bar *here*. The demurrer to the plea must be overruled.

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J. HAYS *v.* N. ARMSTRONG.

The provision of the judiciary law of 1836, respecting appeal bonds, embraces cases pending on appeals, at the time of its passage.

Appeals not quashed in certain cases, unless motion made at the term the appeal is entered.

THIS case was adjourned from the county of Licking. It was a motion to quash an appeal, taken in the cause, from the court of common pleas to the Supreme Court. The facts were as follows:

The appeal was taken by the defendant, and docketed in the Supreme Court, in 1831. At the September term, 1832, it *was [248 continued. At the term of 1833, continued and referred to arbitrators. No court held in 1834. At the September term, 1835, a motion was made by the plaintiff to quash the appeal, on the ground that the appeal bond was not taken in double the amount of the damage recovered, and costs. This fact appeared upon comparing the bond with the recovery of damages and taxation of costs.

H. STANBERY and J. DILLE, for plaintiff.

J. D. KING, for defendants.

Judge LANE delivered the opinion of the court:

This appeal, according to decisions heretofore made in this court, must be quashed, unless it is protected by the provisions of the judiciary law passed at the last session of the general assembly. Section 4 of that act is as follows:

"That no exception to an appeal bond, in any case removed by appeal from a justice of the peace to the court of common pleas, or from the court of common pleas to the Supreme Court, shall be

taken unless the same be done at the term of the court in which the appeal is entered, and the failure to take such exceptions at that time shall be considered as a waiver of all exceptions; and if, upon exception taken, the bond shall be found to be defective, either in form or in any other respect, the appellate court may order a new bond to be given with such security, to the satisfaction of the clerk of said court; and if such new bond be given according to said order, said appeal shall not be dismissed, but the appellate court shall proceed to hear and determine the cause in the same manner as if the bond originally given had been sufficient; *provided*, that nothing in this section contained, shall be construed to extend to bonds not executed within the time limited by law for giving appeal bonds."

It is the object of this section to provide for a class of cases of which this is one. The provision is a remedial one, calculated to aid in the advancement of justice, and should be interpreted liberally to effect that object.

But it is objected that, if this provision is construed to embrace this case, a retrospective operation is given to it. We see no reason why this should prevent its application. The appellee has no vested 249] rights, in the forms of administering justice, *that precludes the legislature from modifying them, and better adapting them to effect their great ends and objects. The new law touches no executed power. It does no more than confer a jurisdiction, in a case pending and undetermined, where, without it, such jurisdiction would be declined by the court. It secures to the parties an investigation of their rights, in a case where a clerical mistake would, otherwise, preclude them from such investigation. The appeal is sustained.

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## Cad. Wallace's Lessee v. Alexander Minor.

A patent for lands from the United States can not be presumed, where the proper records contain no evidence or indication of a grant having been made.

A previous possession of land for twenty-five years, adverse to a regular grant, can not be held to operate a defeat of such grant.

A patent issued to an assignee stands on the same foundation, as to remedy, as if issued to the party originally entitled.

The statute of limitations does not begin to run until a patent has issued from the government empowered to make a grant.

THIS cause was originally adjourned from the county of Ross. A reference to the facts of the case, and the manner in which it now came up, is fully stated in the opinion of the court. The reargument was made by

R. DOUGLASS, for a new trial.

T. SCOTT & SON, against it.

Judge COLLETT delivered the opinion of the court:

This action of ejectment was tried on the circuit in Ross county in 1834, a verdict taken for the plaintiff, and the defendant made a motion for a new trial, which was reserved for decision here. The motion was heard and overruled by the court in bank at December term, 1834, and the court at the same time, on motion of the defendant, granted a rehearing of the motion, and continued the cause. 6 Ohio, 366.

The rehearing was granted on two points only, but the counsel for the defendant, by leave of the court, have reargued the whole cause. They again contend that a patent to Massie, as assignee of Powell, should be presumed to have issued. The one hundred acres in controversy are a part of an entry and survey of eight hundred and sixty-five acres in the Virginia military district, made for Powell in 1793. In 1795, N. Massie was in possession of the whole tract, claiming as assignee of Orr, who was assignee of Powell. In 1808, Massie sold the one hundred acres in controversy to Abrams, who, in 1809, sold and conveyed the same to Findley, and he, in 1814, sold and conveyed to Kerr. *Pos- [250 session accompanied these sales, and was peaceably held until after the defendant purchased the premises now in dispute, as the property of Kerr, at a sheriff's sale in 1829, on a judgment obtained against Kerr in 1816. In 1818, a patent was issued, at Kerr's instance, to the heirs of Powell, on this survey, for the eight hundred and sixty-five acres.

Powell's survey was made in 1793; the patent to his heirs did

not issue until 1818, twenty-five years after. It is believed that it is not very uncommon for surveys in the Virginia military district to remain unpatented for twenty-five years, especially where the owners die, or are non-resident, as is frequently the case. Since 1807, the title of an owner of an entry and survey of a tract of land, in the Virginia military district, is nearly as secure as it would be if patented. Congress, in that year, passed a law providing that no location should thereafter be made of any land which had been surveyed, and that if any location should be made of any land which had been surveyed before the making of such location, and a patent taken out on such relocation, that the patent should be void. Acts of Congress, with similar provisions, have ever since been in force. This makes owners of surveys neglect to cause their patents to issue.

Before the creation of the general land office, patents for these lands issued from the office of the secretary of state, and were there recorded; since, they all issue from and are recorded in the general land office. If a patent had issued to Massie on Powell's survey, it is not probable that the officers in the land office would have issued another on the same survey; and if they had, a copy of the one issued to Massie might have been produced by the defendant. Wallace, in his deposition, says that Kerr, in 1817, discovered that no patent had issued on this survey. He discovered this probably by examining the records of these offices and of the war office, where these surveys are examined before patents issue. 5 Pet. Cond. 243. It seems to us, as it did to the court last year, very clear that no patent in fact issued on Powell's survey before the one to Powell's heirs. The defendant's counsel urge that if the court come to this conclusion, still, after so long an adverse possession, justice and policy require that a grant be presumed, or that Wallace should not be permitted to set up the patent of Powell.

251] *In 1817, Kerr discovered that this survey was unpatented. Until then he probably believed that he held the fee in the premises, for Findley had made him such a deed, with warranty, in 1814, as would have conveyed the fee if it had been held by him. Kerr, then, to secure his equitable estate, endangered, as he thought by McArthur's entry and by the title being in the United States, caused the patent to issue to Powell's heirs. Kerr continued in

possess ion until after the property was, as his, sold by the sheriff in 1829, on the judgment of 1816.

The twenty-five years of adverse possession, before the issuing of the patent, could not authorize the court to say that it was void, which would virtually be the case if the court were on any grounds to refuse to Powell's heirs the right of setting it up. We have before said that it is not unusual for these surveys to be unpatented for this length of time. Kerr placed the legal title in the heirs of Powell. After that, the possession of Kerr, in the aspect we are now viewing the case, could hardly be said to be adverse. The title of the defendant can be no better than that of Kerr, and Kerr's was an equity only, with possession—a right to obtain in chancery a conveyance of the legal estate. 5 Ohio, 455.

The heirs of Powell could set up this patent against the defendant in this action if they had not aliened, and we see nothing in the case to prevent Wallace from doing so. He is a trustee for the heirs and creditors of Massie, appointed in 1820, with power to get in the title to all lands belonging to them, in their names, and to sell and convey the same for the benefit of the creditors and heirs. 19 Ohio Stat. 30. Wallace obtained, in his own name, a conveyance of the whole of the survey of eight hundred and sixty-five acres from the heirs of Powell, in 1826 and 1830. The deed from Massie to Abrams, although not executed so as to have conveyed the legal estate if it had been held by Massie, contained a covenant of warranty, of which Kerr might have availed himself if his title had failed; yet, as Kerr put the legal title into the hands of Powell's heirs, Wallace might have questioned whether if it failed, on that account, the heirs of Massie were liable. As to the equitable estate in the balance of the survey, we do not know where it was when Wallace became trustee in 1820. It is, then, clear that Wallace, by taking these conveyances in 1826 and 1830 to himself and not to the heirs of Massie, violated his *trust, [252 or that he intended to aid Kerr in defrauding his creditors? If it was, in this court it could make no difference. Kerr had the equity only with the possession. To hold that Wallace's deed was void, would return the legal title, not to Kerr, and so to the defendant, but to the heirs of Powell. And so, as to the creditors and heirs of Massie. Wallace got the legal title with knowledge of Kerr's equity, and holds it subject thereto—in chancery, so he holds in relation to the creditors and heirs of Massie.

It is insisted that when the legal title came to the heirs of Powell, it inured immediately to the alienees of Massie. Powell sold to Orr, and Orr to Massie. We do not know how Powell conveyed his interest in this survey, whether by assignment or otherwise. It is not probable that, owning the equity only, he assumed to own the fee, and conveyed with warranty in such manner as would have conveyed the fee, if he had then held it. We can not presume that he did so. If he did, the instrument might have been produced, or a copy from the records. Unless the transfer of Powell's interest was made in this manner, the legal title did not pass by operation of law from Powell's heirs. Lessee of Patterson *v.* Pease et al., 5 Ohio, 190; Bond *v.* Swearingen, 1 Ohio, 395.

Again, it is contended that the defendant is protected in his possession by the statute of limitations. It is the opinion of a majority of the court, that the owner of an entry and survey, in the Virginia military district, can not sustain an ejectment to recover the possession of the land entered and surveyed. That he must, before he brings his action, obtain the legal title from the United States; that before he does this, his title is an equitable one only. No right of action having accrued to Powell in his lifetime, nor to his heirs, until their patent issued in 1818, which is not yet twenty-one years, this action is not barred by the statute. Upon the whole case, the court are of opinion that the motion for a new trial must be overruled, and judgment entered on the verdict for the plaintiff.

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253] *Henry Haines *v.* Henry Welling.

If one utters slanderous words of another, stating at the time that he heard the charges from a person whom he names, he is not protected from the action of the injured party. A plea setting forth such defense is bad after verdict.

This was reserved in the county of Coshocton. The action is slander, in which the declaration charges that the defendant uttered of the plaintiff certain slanderous words, charging him with

the crime of larceny. It is unnecessary here to state the specific words.

To the declaration the defendant pleaded, first, the general issue; second, a special plea in bar, setting forth in substance, that one Benjamin Ulin spoke and published of the plaintiff the identical words laid in the declaration; and further, that the defendant, when he spoke the said words, declared in the presence and hearing of the same person in whose presence and hearing said words were by him spoken, that he had been told the same by said Henry Ulin.

This latter plea was traversed by the plaintiff. The issues joined were submitted to a jury at the last term of the court in Coshocton county, and a verdict returned for the defendant upon the second plea.

After verdict, the plaintiff moved the court to direct a new trial, and to order a *venire facias de novo*, assigning for cause that the verdict was against law and evidence, and that the second plea was no bar to the action; and also moved the court to order a repleader.

SPANGLER and CULBERTSON, for the plaintiff, insisted that the second plea does not contain matter which in law operates, or ought to operate, as a bar to the action, and they cited the case of McPherson *v.* Daniels, 21 E. L. R. 61.

They further insisted that the plea was so far defective in form, as not to constitute any defense.

SWAYNE, for the defendant, contended that the form of the plea was in accordance with the precedents, and cited 3 Chit. Pl. 1035.

He further insisted that the matter of the plea was a sufficient defense, and that the case of McPherson *v.* Daniels was in contradiction to all previously decided cases, and ought not to be considered as law. Upon this point he cited 1 Term, 19; 2 E. 435; 5 E. 471; 3 Barn. & Cres. 24; 1 Com. Dig. 202; 4 Bac. Ab. 505; Wright, 316.

*Judge HITCHCOCK delivered the opinion of the court: [254

Without going into a minute detail of the testimony in this case, I will only say that, in the opinion of the judges who tried it, the weight of that testimony was against the verdict. But inasmuch

as it was not entirely against evidence, and as we do not like to interfere with the verdicts of juries in this class of cases, had there been no question with respect to the pleadings, judgment would probably have been rendered for the defendant.

The principal question presented by these pleadings is, whether it can be a good defense to an action of slander for the defendant to show by his plea, that when he spoke the words, he stated that he had heard them from another, naming at the same time his author; and showing further that the author referred to, had spoken the same words. We are aware that it is laid down in some of the elementary books that such is the law. The same principle is found in reported cases; and it is known that such has been the decision of this court upon the circuit. But is it a sound principle? Does it comport with the object and intention of the action of slander?

"Slander is the defaming a man in his reputation, by speaking or writing words, from whence any injury in property or character arises, or may arise to him of whom the words are used." Com. Dig. 496. Or it "is the publishing of words, in writing, or by speaking, by reason of which the person to whom they relate becomes liable to suffer some corporal punishment, or to sustain some loss of property." 6 Bac. Ab. 201. Or, according to Chancellor Kent, "the injury consists in *falsely and maliciously* charging another with the commission of some public offense, or the breach of some public trust, or with any matter in relation to his particular trade or vocation, and which, if true, would render him unworthy of employment; or lastly, with any other matter or things by which special injury is sustained." 2 Kent's Com. 16. The object of the action of slander is to recover damages for the injury sustained in consequence of such false and malicious charges, and also, where there is a great degree of malice, to punish the slanderer for his misconduct. Now there can be no doubt that as great and lasting injury may be done to reputation, as deep an impression may be made upon the minds of those who 255] hear, where the slanderer speaks of a charge *made as a report, tracing that report to a particular individual, as if he made the charge upon his own responsibility. In many cases, there is no more effectual way of destroying character than by dark insinuations, that the individual referred to is suspected, that this, that, and the other say that he is guilty. In truth, this is

the course more usually resorted to, by him who is determined to inflict an aggravated injury upon his neighbor. But if the matter contained in the plea in this case be a good defense to the action, the individual thus conducting, if he can but prove that the persons referred to have said of him who is charged that he is guilty, will screen himself from liability, no matter as to the extent of the injury.

Again, if the principle be adhered to that a defense like the one interposed in the present case is available, then the slanderer will be at full liberty to propagate reports originating with the most worthless members of the community—originating with persons whose characters, where known, would be a sure protection against any slander they might utter, but whose characters are or may be unknown to those to whom the slanderer makes the communication. As a matter of fact, we know that resort has been had to this kind of management, to gratify a malicious disposition, and at the same time to avoid responsibility.

Further, unless there be malice, there is no slander. In order to constitute the offense, the words must be *falsely* and *maliciously* spoken. In truth, malice constitutes the *gist* of the action. Malice will be implied from the speaking of certain classes of words. But this presumption may be rebutted. As much malice may be evinced in circulating as in originating slanderous rsports. And that rule can not be a good one which would subject to liability the author while it exempts the propagator, both being actuated by the same malicious motive, and both inflicting the same degree of injury.

We have ever doubted the propriety of this principle, and, whenever an attempt has been made to defend under it, have witnessed more or less of its injustice, and of difficulties growing out of it. In the case before the court there was, as appeared to the judges who attended the trial, evidence of a much more than ordinary degree of malice.

There is no necessity for it in practice. If slanderous words are spoken under circumstances which negative the *pre- [256 sumption of malice, whether an author be given or not, they are not actionable, malice being the *gist* of the action. And the question of malice is at all times open for investigation. In every case, whether the defendant be the author, or whether he be

merely the propagator of a slander originating with another, the proper inquiry is, were the words maliciously spoken, and that question properly arises under the plea of the general issue. And should a defendant be able to satisfy a jury that, in speaking the words, he, in good faith and without any improper motive, had merely communicated information received from another, it is not to be expected that any jury or any court would mulct him in damages, for such state of case would rebut all presumption of malice. So far as the matter contained in the plea can be relied on as a defense, it is a defense under the general issue.

In a late case in the court of king's bench, McPherson *v.* Daniels, 21 Eng. Com. Law, this subject was fully considered. It is true that the question before the court was rather as to the form than the substance of the plea—a plea substantially the same, if not precisely the same, with the one before this court in the present case. But in deciding the case, the court held, in strong language, that it was no defense in an action of slander that the person uttering the words should, when he uttered them, give his author.

It seems, to a majority of the court, that this decision is consistent with policy, right, justice, and common sense, and we are willing to adopt it as the law of this case.

The verdict of the jury must be set aside, a *venire facias de novo* awarded, and a repleader ordered. As, however, the plaintiff took issue upon the plea, instead of filing a demurrer, he must pay the costs of the trial.

Judge Wood dissented.

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257] *Lessee of Mitchell and others *v.* Henry Eyster.

Party interested in judicial proceedings, not concluded by the made up record, where important facts, existing among the papers on file, or in the minute book entries, are omitted in such record.

In foreign attachment, indebtedness and non-residency of the defendant, and a levy of the attachment upon property subject to the suit, facts necessary to attach jurisdiction.

Under the attachment law of 1805, sheriff omitting to sign the inventory and appraisement, a mere irregularity that does not affect the validity of the proceedings.

Under the attachment law of 1805, it was regular to bring a foreign attachment against the administrators of a deceased debtor, in a case where such administrators would have been the proper parties, could process have been served upon them personally.

A new enactment of a remedial law respecting judicial proceedings, with a repealing clause in general terms, saying nothing as to suits pending, does not abate such suits.

THIS cause was adjourned from the county of Trumbull. It was docketed in this court at December term, 1834, and continued. The land in controversy is claimed by the lessors of the plaintiff, by descent from their ancestor, Abraham Falconer, and by the defendants under certain proceedings in attachment against the administrators of Abraham Falconer. The plaintiffs' title was admitted to be perfect, unless divested by those proceedings.

The writ of attachment issued from the court of common pleas of Trumbull county, on March 19, 1810, returnable to the March term of that year. It contained no recital that an affidavit had been made of the indebtedness or non-residence of the debtor, other than the command to attach the goods, chattels, lands, etc., of Abraham Falconer, late deceased, which are in the hands of Isaac Newkirk and Betsey Falconer, administrators of A. Falconer, deceased, *now non-resident debtors.* This writ was returned as levied upon the lands in controversy, with an inventory and appraisement signed by two freeholders, but not otherwise signed by the officer than as part of his return on the writ. Upon this return, auditors were appointed to adjust the claims, and the cause continued to the next term, and again continued to the third term, November, 1810, when the auditors reported, and an entry was made in these words: "*Whereupon it is considered by the court that judgment be entered agreeably to the aforesaid report.*" An order was made that the land be sold, and the cause continued by continuances to November term, 1811, when, upon a return of the sale and conveyance of the land attached, a formal judgment was entered, that the plaintiff recover of the defendants, in their capacity of administrators, the sum of six hundred and sixty-six dollars and forty-three cents damages, and eight dollars and thirty-five cents costs, as reported by the auditors.

The clerk made a record of these proceedings as above recited After their validity was drawn in question, a motion was made in the common pleas to amend the record, by inserting in it the

original affidavit, found on file, upon which the attachment issued, and also correcting the entry of the judgment of November term, 1810, so as to make it complete as to the amount recovered. These amendments were ordered by the court.

258] LOOMIS and METCALF, for the plaintiff, *upon this state of case, contended that the proceedings in attachment were inoperative to divest the title of the plaintiff, because:

1. That the record showed no affidavit as a foundation upon which the writ of attachment issued.

2. That the sheriff had not signed the inventory and appraisement as a party acting with the freeholders.

3. That the sale of the land was void, because made before final judgment.

4. That the suit should have been brought against the heirs, instead of the administrators.

5. That the proceedings, while pending, were put an end to by the repeal of the law under which they commenced, without any saving clause.

6. That the case could not be aided by the matter inserted in the amended record.

As a general principle, they insisted that an attachment was an extraordinary process, unknown to the common law; that the proceedings upon such process must be construed strictly, and that the record must sufficiently show that the facts existed giving to the court jurisdiction, otherwise that the proceedings were void. They cited Burden *v.* Fitch, 15 Johns. 141; Bigelow *v.* Sears, 14 Johns. 40, 41; 2 Ohio, 239; 4 Ohio, 239; 5 Ohio, 155.

Upon the subject of mistaking parties defendants, they cited 1 Stark. Ev. 185, 191.

On the effect of the repeal, they cited 1 Kent's Com. 569; 1 Wm. Black. 451; 4 Yeates, 396; Wheat. Dig. 569.

HITCHCOCK, for the defendants.

Judge WOOD delivered the opinion of the court

A record is made of judicial proceedings for the purpose of preserving the evidence of what was transacted for the use and benefit of those interested in these transactions. If, in making up this record, the clerk omit any material fact, which papers on file, or

entries on the minutes or journals of the court, show to have existed, such omission can not prejudice the party further than to put such party to the inconvenience of hunting up the proofs. It is not uncommon, *when the transcripts of the records of [259 inferior courts are certified, upon judicial process, to superior courts, and are found defective, to allege diminution, and issue a process for a more complete record. In such case, the omitted fact, if found in a proper form, is added to the record, and certified as part of it.

In this case, the omission of the clerk to embody the affidavit, upon which the writ of attachment issued, in the record, does not deprive the party interested of the use of that affidavit. It is properly added to and made part of the proceedings, and shows that the first exception taken by the plaintiffs' counsel is incorrect in point of fact.

The same principle is applicable to the third exception taken. The journal memorandum of the entry of judgment at November term, 1810, is a minute of what was done, which, upon making up the record, might well be filled up and made complete by inserting in it all that it properly covered. It was, in substance, a judgment upon the auditor's report as to the amount due. That report is on file, and is referred to in the journal entry, and thus made for the purposes of justice as a part of that entry. We think, therefore, that the first and third exceptions are not sustained by the facts. There was an affidavit of indebtedness and non-residence, and there was such a final judgment as the law contemplated antecedent to the sale of the land.

To sustain the claim of the plaintiffs, it is indispensable that the proceedings on the attachment be regarded as *coram non judice*, and, therefore, absolutely void, either at their commencement or at the time of the judgment and the order of sale.

The facts necessary to attach jurisdiction at the commencement of the suit were these: the indebtedness of the defendant, his non-residence, and the actual levy of the attachment upon property owned by him, or in his hands subject to the payment of the debt sued for. Upon the proper existence and showing of these facts the jurisdiction of the court attaches. They are all shown to have existed in the case under consideration, consequently the proceedings can not be considered as *coram non judice* at their commencement.

The second exception taken is that the sheriff did not sign the inventory and appraisement with the freeholders. This is but 260] an irregularity in the intermediate proceedings, *and can neither overreach the jurisdiction already attached nor invalidate the subsequent judgment and order of sale.

The position that the suit should have been brought against the heirs, and not the administrators, is strongly urged by the plaintiffs' counsel. If they are right, these proceedings are not maintainable, for the making the proper parties defendants is one of the facts essential to giving the court jurisdiction.

The law under which the suit was brought expressly provided that "in case of a debtor residing out of the state, the writ of attachment, *as above provided*, may issue against his heirs, executors, or administrators." The writ of attachment, "*as above provided*," was authorized to be levied upon "lands, tenements, goods, chattels, rights, credits, moneys, and effects." In determining whether it should issue against the heirs or against the personal representatives, it was necessary to look at the nature and character of the action to be commenced. By what rule could this be decided? We think by none better than this: were all the parties defendants in the state, against whom should the suit be brought for which the attachment is prosecuted? In the case stated, the suit in question must have been instituted against the executor or administrator. It could not have been sustained against the heir in the first instance, under the law then in force. We are satisfied the administrators were properly made defendants.

This attachment was commenced in March, 1810. When the act of February 14, 1810, took effect, on the first of June of that year, the case stood upon the return of the property attached and the appointment of auditors. The new law repealed that under which the attachment issued, and whilst it re-enacted all the provisions of the repealed law, it contained no saving clause for the protection of suits pending. The plaintiffs' counsel contend that this repealing law takes away the foundation upon which the attachment was commenced, and rescinds the power of the court to proceed further in the case; that it leaves nothing for the future action of the court to stand upon. We can not adopt this opinion.

An attachment such as the one in question, though a statutory, is a remedial process. The law authorizing the commencement of an attachment for debt, and the proceedings upon it, contains

no provisions of a penal character; none more so, certainly, than every law that subjects real estate to be transferred from one person to another upon judicial *process. Where there is no [261 express indication of legislative intention, it is not to be assumed that it was intended by any new enactment to arrest the regular prosecution of process essentially remedial, and take away the right acquired under it. Possibly it is competent for the legislative power to do this; but it is only to be imputed to them when the language they have employed admits of no other interpretation. Here that is not the case.

The law of 1810 re-enacts substantially all the provisions applicable to the case before us of the law of 1805. The instant one law ceased to have effect, the other came into operation. The rule of proceeding and of property was never changed.

It is remarkable of the enactments of the session of the legislature of 1809–10, that in their revisions of the general laws, at that time, they studiously omitted a saving clause, connected with the repealing clause of the revised laws. The statutory civil code was extensively revised that session. Among the acts necessarily affecting judicial process, then pending, are the following: "An act to provide for the recovery of money secured by mortgage;" an act allowing mutual debts and demands to be set off, and concerning tenders;" "an act for the limitation of actions;" "an act regulating judgments and executions;" "the act allowing and regulating writs of attachment;" "an act directing the mode of proceeding in chancery;" "an act to reduce into one the several acts organizing the judicial courts, defining their powers, and regulating their practice." Not one of these enactments contain a saving clause to protect suits pending. No question was raised at the time as to their effect upon such suits. The bar and the courts seem to have concurred in the interpretation of the legislature of that day that, in remedial proceedings, such saving clauses were unnecessary. It would be very unsafe for us now to disturb this then universally admitted proposition, upon the authorities of the jurists or of the adjudged cases of other states or countries.

It is very remarkable, too, that there is one law of the enactments of this session of 1809–10, that contains such a saving clause as is called for by the plaintiffs' counsel in this case. This is found in the act "levying a tax on land," and in a proviso to

the general repealing clause. By this proviso all penalties in-
262] curred and prosecutions pending are expressly *saved. And this saving is in exact accordance with the true principle. The law was penal, not remedial; consequently, the penalty and the suit to recover it would be lost if not saved from the effect of the repeal by legal provision. This shows that the subject was understood by the legislature, in 1810, just as the courts and the profession understood it. To this construction we are bound to conform. And we find no difficulty of principle in doing so.

With respect to the amended or corrected record, it is unnecessary to say more than has been said. Whether we obtain the additional facts it contains from it, or from their existence on the files and the journals or minutes, does not affect the case. We are bound to look to these facts as existing, and to give them the weight due to them, so far as they affect the questions before us.

The judgment must be for the defendant.

Judge HITCHCOCK, having been counsel for the defendant, did not sit in this case.

NOTE.—The case of Voorhees, plaintiff in error, v. Bank of the United States, 10 Peters, 449, decided in the Supreme Court of the United States, January term, 1836, sustains every position taken in this opinion. The questions raised were originated upon a proceeding in attachment in Hamilton county, Ohio, in 1807 and 1808.—REPORTER.

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## JOHN MONROE v. JOHN DOE, LESSEE OF THOMAS MORRIS.

An undisturbed possession of lands for twenty years is no bar to the recovery in ejectment, upon a sale for taxes made within that period.

RESERVED in the county of Clermont.

The original case upon which this writ of error is brought, was submitted to the court of common pleas on the following agreed state of facts:

1. That a patent issued for the land in the declaration men-
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tioned, and which is the subject of controversy, to one Oliver Towles; that the same was sold for taxes due thereon to one John Bogges, who assigned the certificate of purchase to said Thomas Morris, lessee of the plaintiff, to whom the auditor of the county conveyed said land, by virtue of said sale, before the commencement of this suit; that said land was taxed and sold for non-payment of taxes as aforesaid in the name of Towles, the patentee, according to the tax laws.

2. That a patent issued for said land to William Lytle, *and he, after the issuing of said patent, to wit: on July [263 3, 1810, conveyed the same by deed, duly executed, to one Jones Bunnell, who, under said deed, entered upon and occupied said land from the date of said deed until April 10, 1811, on which last-named day said Bunnell, by deed duly executed, conveyed said land to said John Monroe, who then entered upon and occupied the same, and has continued said possession ever since, and still holds said possession.

3. That the patent for said land to said Towles is older in date than that which issued as aforesaid to said Lytle.

4. That the land deeded by Lytle to Bunnell, and by Bunnell to Monroe, was recovered in ejectment, in the Supreme Court of Clermont county, by Towles; that application was made for the value of improvements by Monroe; that the same was assessed and returned, where the cause is still pending, no writ of possession having issued.

It was further agreed that if the law arising out of the above facts was with the plaintiff, then the court should render judgment in his favor for the land in controversy, otherwise that judgment should be rendered for the defendant.

Upon this agreed state of facts, judgment was entered for the plaintiff, to reverse which judgment this writ of error is brought, and the general error assigned.

M. Marshall, for plaintiff in error, insisted that the defendant in the court of common pleas was protected by the statute of limitations. The case shows that he, and those under whom he claims, had been in possession more than twenty-one years. The plaintiff is in no better situation in consequence of the purchase for taxes than Towles' would be. He merely purchased Towles' title. Towles could not sustain an action against the defendant, because the stat-

ute would continue to run, notwithstanding the former recovery, execution of which is stayed under the occupying claimant law. The former recovery would not operate as a bar to a new action, neither would it operate to take the plaintiff's case, in such new action, out of the statute of limitations. He cited the following authorities: Tillinghast's Adams on Eject. 76, 77; 2 Hen. & Munf. 318; 1 Marsh. Ky. 61; 3 Litt. 34; 4 Mon. 302; 1 Marsh. 233; 3 Marsh. 30; 2 Bibb, 150; 4 Litt. 233; 4 Mon. 350; 6 Mon. 491.

No argument was presented for the defendant in error.

264] *Judge HITCHCOCK delivered the opinion of the court:

The ground relied upon to reverse the judgment in this case, is, that the facts agreed, show that there has been in Monroe and those under whom he claims an uninterrupted possession of more than twenty-one years, which, it is insisted, is evidence of right and constitutes a good defense in ejectment. In ordinary cases, there can be no doubt of the soundness of this position, and there is certainly much ingenuity displayed by counsel in striving to make it applicable to the case under consideration. Had the suit been brought in the name of Towles, or rather had the demise been in his name, there might have been more difficulty. Still, there is no statute of limitations which would prevent Towles from the recovery of these lands. For then he has already subsisting judgment which he can, at any time, carry into execution, by complying with the law, and paying for the improvements. Whether, under these circumstances, he could sustain a new action, and set up the former recovery, to bring himself within the savings of the statute of limitations, is, to say the least of it, doubtful. But I apprehend it is not necessary to decide this point. This suit is not on the demise of Towles, but on the demise of Morris, who claims title as a purchaser for taxes. The great mistake in the argument of counsel is, in the assumption, that inasmuch as the lands were listed in the name of Towles, the tax purchaser stands in the place of Towles, and must take the land subject to all his disabilities and liabilities. In other words, that he takes the title of Towles, and nothing more.

There is a difference in sales for taxes and sales upon execution. The statute regulating sales upon execution, prescribes the mode of proceeding and the effect of the sheriff's deed. He shall make to the purchaser "as good and sufficient a deed of conveyance, for

the land and tenements so sold, as the person or persons against whom such writ or writs of execution were issued, might or could have made for the same, at or any time after said lands became liable to said judgment." And the deed so made "shall vest in the purchaser as good and as perfect an estate, in the premises therein mentioned, as was vested in the party at or after the time when said lands and tenements became liable to the satisfaction of said judgments." 29 Ohio Stat. 105. The sheriff's deed purports to transfer the title of the judgment *debtor and nothing more. [265 It is different in sales of taxes. True, the land taxed is not forfeited to the state until it has been offered for sale. But still, the state has a lien upon all land not exempt from taxation, which is calculated to be perpetual, and which can not be affected by any sale or transfer. 29 Ohio Stat. 278. Neither will any length of possession affect this lien. It can be removed in no other way than by the payment of all taxes, penalties, and interest due upon the land. When the land is sold, or rather after it has been sold two years, it is made the duty of the county auditor to make a deed to the purchaser, and the lien declares the effect of this deed to be, to "vest in the grantee, his or her heirs and assigns, a good and valid title, both in law and equity." And the law further provides, that the deed so made "shall be received in all courts as *prima facie* evidence of a good and valid title in such grantee, his heirs and assigns." From these parts of the law, it is apparent that while the sheriff's deed purports to convey nothing more than the interest of the judgment debtors, the auditor's purports to convey the absolute title.

To permit the statute of limitations to operate as a bar in the present case, would be in effect to defeat the lien of the state for taxes. It would be to permit the statute to run against the government. And as well might we permit the statute to operate where the title to the land itself remains in the government, as in a case like the present. Had Monroe himself paid the taxes, then the case would have been different. True, the auditor's deed would be *prima facie* evidence of title. But still, this might have been rebutted, by showing that the taxes had been paid. Such payment would have removed the lien of the state, and would have shown that the sale itself was improper. But there is no evidence or pretense of any such state of case. The plaintiff in error rests upon his naked possession, insisting that, inasmuch as

this would be a good defense against Towles, it must be so against Morris.

It is not so, however. The title of Morris may be considered as an original title derived from the state. And before his claim can be barred by the statute of limitations, there must have been a continuous adverse possession for the term of twenty years, commencing at a time subsequent to his purchase. There is no error in the judgment of the court of common pleas, and the same is affirmed with costs.

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266] *Treasurer of Guernsey County, for Use, etc. v. Lennington's Adm'rs.

The law of 1834, directing upon what liquidation of an executor or administrator's accounts suit may be sustained against securities, does not apply to suits commenced before the passage of that law.

This cause was adjourned from the county of Guernsey. It was an action of debt, upon the bond of an administrator, and brought against the securities. The bond was taken under the law of 1816, and the suit was commenced before the taking effect of the law of 1834 on this subject. The case made in the declaration is this:

Upon the death of Thomas Haines, the intestate, Lennington, and John Haines, were appointed administrators of Thomas Haines deceased, gave bond, qualified, and took upon themselves the execution of the duties of administrators of Thomas Haines, deceased. In the execution of their duties, they received considerable sums of money of the estate of Thomas Haines. No account was rendered of their administration, although the time allowed by law, and further time extended by the court, expired in Lennington's lifetime, who died, leaving the whole business unsettled, and administration upon his estate was granted to the defendants. The declaration then recites that subsequent to the death of Lennington, the individual for whose use the suit was brought, recovered two judgments against J. Haines, surviving administrator of T. Haines, for debts due from T. Haines in his

lifetime. The breach assigned, is for the nonpayment of these judgments. The defendants demur, generally, to the declaration.

B. S. COWEN, for plaintiff.

W. B. BEEBEE, for defendants.

Judge COLLETT delivered the opinion of the court:

A number of questions are raised in this cause, which it is unnecessary now to decide. The suit was brought before the statute of 1834, directing upon what liquidation of the accounts of executors or administrators suits should be sustained against their securities. It must be decided upon the rules established before the enaction of that statute. These are laid down in Chaplain *v.* Treasurer of Champaign County 4 Ohio, 98, and Treasurer of Montgomery County *v.* Kemp, 5 Ohio, 241. Upon the authority of these cases the demurrer must be sustained.

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*CARLISLE AND WADDLE *v.* WM. MCDONALD. [267

Cause decided in bank, rehearing can only be allowed at the same term, in the same court.

THIS cause came before the court upon a motion to dismiss an order for a rehearing upon the following petition and allowing:

"To the honorable the Supreme Court of the State of Ohio, the petition of Carlisle and Waddle respectfully represents, that they have prosecuted a bill in chancery *v.* McDonald, which came before the Supreme Court of the State of Ohio, at their special session at Columbus, in December, 1833, for decision, which bill, answer, and replication, with exhibits and depositions, are, as upon reference to them, will appear, and which are made part of this petition. That the said Supreme Court, at their said special session, pronounced a decree dismissing said bill. Your petitioners humbly request that the said cause be reheard, for reasons apparent on the said proceedings and decree, and full equity done in the premises, and your petitioners will pray."

G. SWAN, for complainant.

The prayer of the foregoing petition is allowed.

"E. LANE,
J. C. WRIGHT,
"*December* 21, 1833. *Judges Supreme Court.*"

LEONARD, in support of the motion to dismiss:

A rehearing is never allowed on a bill of review, or on a supplemental bill in the nature of a bill of review. Cowp. Eq. 93, 94, 96; 2 Mad. Ch. 404–407.

R. DOUGLASS, on the same side.

G. SWAN, contra.

Judge COLLETT, delivered the opinion of the court:

Two judges can allow a rehearing of a cause decided on the circuit, where two judges hold the court and make the decree. But upon a decision in bank, a rehearing can only be allowed in open court in bank. The motion to dismiss must prevail.

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268] *JOHN MCCOY *v.* WM. Y. GILMORE, ADMINISTRATOR DE BONIS NON OF ROBERT KERCHEVAL, DECEASED.

A note for eight hundred and sixty, not saying what, concludes thus: "For value received, $860," is a good note for that sum. Note made payable to A. B., administrator of C. D. A. B. dies, suit must be brought in the name of his executor or administrator.

RESERVED in the county of Ross.

This case comes before the court on writ of error to the court of common pleas of Ross county. The original case in that court was *assumpsit*, in the name of Gilmore, as administrator *de bonis non* of Kercheval, against John N. Pomeroy and John McCoy. The writ was returned served as to McCoy, and not found as to

Pomeroy. Upon the return of the writ, the plaintiff filed his declaration containing four counts.

The three first counts are upon a promissory note made by the defendant, to one Henry Johnson, administrator of Robert Kerchevel, for the sum of eight hundred and sixty-eight dollars, payable twelve months after date, and bearing date April 17, 1833, and averring in each count that said note was made to said Johnson, in his capacity as administrator. The fourth count is for goods sold by the said Henry Johnson, as administrator of Kercheval. It is further averred that Henry Johnson is deceased, and that the plaintiff has been appointed administrator *de bonis non* of Kercheval.

The defendant craves oyer of the note, which is as follows:

"Chillicothe, April 17, 1833. Twelve months after date we promise to pay Henry Johnson, administrator of Robert Kercheval, deceased, the sum of eight hundred and sixty-eight for value received—$868. Signed, JOHN N. POMEROY,
JOHN McCOY."

After which he demurred generally.

Upon hearing, the court of common pleas overruled the demurrer, and rendered judgment in favor of the plaintiff, for the amount of the note and interest.

To reverse this judgment, this writ of error is brought, and it is assigned for error:

1. There is no such privity of contract between the deceased Kercheval and the defendant in error, as will authorize a suit in the name of Gilmore, administrator *de bonis* of Kercheval.

2. That the note upon which suit is brought, is not such an instrument, and does not contain such a promise as will lay the foundation of an action.

*Other errors are assigned, but it is unnecessary to notice [269 them.

SILL, for plaintiff in error:

1. This action should have been brought by the administrators of Henry Johnson, and not by the present plaintiff, for though the note was given to Johnson with the addition of *administrator*, yet this is mere surplusage, and may be rejected. 1 Salk. 207; 3 Ib. 105; Wilcox Cond. 300, 301; 2 Ohio, 256; 4 Term, 347. This

note, if recovered, would not be assets. By taking it, Johnson rendered himself personally liable to the creditors of Kercheval.

2. The paper set out as a note is not, from the face of it, a promissory note. No money is promised to be paid, and the figures in the margin, or at the bottom, can not be taken into consideration. They constitute no part of the instrument.

3. If the instrument sued is of that nature that Johnson must have brought suit in his representative character, then it is admitted that the present plaintiff may sustain an action upon it in his representative character. But Johnson might have sued in his own private character, and if he had sued as administrator the addition would have been considered as a mere description of the person. In the event of a judgment against him, that judgment would have been made of his own goods, and not of the goods of the deceased; neither could he have appealed without bond.

T. Scott & Son, for defendant:

1. It is averred in the declaration that the note in suit was given to Johnson in his representative capacity as administrator of Kercheval, and the demurrer admits the demand to be true; consequently the right of action, upon the death of Johnson, vested in the plaintiff's administrator *de bonis non.* The money, had it been collected by Johnson, would have been assets in his hands, from which it would seem necessarily to result that this action is well brought.

Executors and administrators may sue in their representative character in all cases where the money, when received, would be assets. 1 Term, 487; 3 East, 104; 3 Term, 659; 2 M. & S. 408, 216, a; 2 Lev. 165; 6 Price, 412; 2 Dowl. & Ryl. 270; 5 East, 150; 1 Term, 312.

270] *When an executor or administrator dies, rights belonging to him as such pass to the representatives of the testator or intestate's estate, and therefore an administrator *de bonis non* must be appointed. 5 Price, 412; Ham. 136; Chit. Pl. 14; 1 B. & C. 154; 2 D. & R. 272; 7 Term, 182; Saund. Pl. 497, 572.

2. A complete answer to the objection, raised by the second assignment of error, will be found in 2 Chit. Pl. 30, 31, 80; 3 Stark. Ev. 1235; 6 Ohio, 416.

Judge HITCHCOCK delivered the opinion of the court:

As to the second error assigned we have no difficulty. It is true that in the written bond of the holder the word dollars is omitted, undoubtedly by mistake. But in the same line eight hundred and sixty-eight dollars in figures is inserted. This, we apprehend, is sufficient to make the instrument a good promissory note for that sum.

The other error assigned presents more difficulty. It raises this question, whether an administrator *de bonis non* can sustain an action in his own name and in his representative character, where a promissory note is made payable to the former administrator, in which the payee is described as administrator of the intestate. So far as we have known anything of the practice upon the subject in this state, it has been to sue such notes in the name of the representative of the person to whom the note was given. There is much force in the authorities cited by the defendant's counsel to show that a different practice might, with propriety, be pursued. Still we are not satisfied that it would be proper. Certainly there is no privity of contract between the intestate and the maker of the note. It is a contract made after his decease, and the only indication that it has any connection with his estate is, that it is made payable to the payee, naming him as administrator. This has been held to be a mere description of the person. By taking the note the payee may become liable to the creditors of the intestate to that amount. He will be so liable if the consideration of the note was any part of the estate of the intestate; and being so liable, it seems to be proper that his representatives should collect the money. To adopt a different principle might lead to this difficulty, that where an administrator had improvidently intrusted the property of the intestate to irresponsible individuals, he would *exonerate himself from liability [271 by taking notes payable to himself as administrator. The promise in the present case is to Henry Johnson, administrator, etc. This addition has heretofore been considered merely as a description of the person, and we are inclined still so to consider it. The suit should have been brought in the name of the representatives of the payee, and not of another person. On this account we think the court of common pleas erred in overruling the demurrer, and for that error the judgment will be reversed.

Judge COLLETT dissented.

LESSEE OF JOSEPH SHEPHERD v. COMMISSIONERS OF ROSS COUNTY.

A decree of the circuit court of the United States, made in that court sitting for the district of Ohio, directing the conveyance of lands, does not operate as such conveyance under the laws of Ohio.

THIS case was reserved in the county of Ross.

It is an action of ejectment for the recovery of a small parcel of ground at the south end of the bridge over the Scioto river, near Chillicothe. The case was submitted to a jury at the last term of the court in Ross county, and by consent of parties, a verdict was returned for the plaintiff, subject to the opinion of the court, upon an agreed statement of facts, in substance as follows, to wit:

"The premises in controversy are covered by a patent granted by the United States to the children of Nathaniel Massie, deceased, in whose name the entry and survey is made, upon which the patent is based; said Massie, in his lifetime, conveyed the premises to Thomas James, who afterward conveyed the same to Humphrey Fullerton, and Fullerton, by article of agreement in writing, permitted the bridge company to occupy the same, so long as said bridge continued to be used as a toll bridge, under which article the defendants are in possession and claim title

"A decree was rendered in the seventh circuit court of the United States and district of Ohio, in a suit in chancery, prosecuted by John Watts against said Fullerton and others, by which decree Fullerton was ordered and directed to convey the premises in question to Watts; but it is not, however, believed that any conveyance was ever made in pursuance of said decree.

272] *"Watts afterward obtained a patent covering the premises, which patent is junior to the one granted to the heirs of Massie as aforesaid, and subsequently conveyed to the lessor of the plaintiff.

"If, upon investigation, the court shall be of opinion that the plaintiff is vested with the legal title, judgment is to be entered upon the verdict; but, if otherwise, the verdict is to be set aside, and a new trial ordered."

DOUGLASS, for plaintiff.

SCOTT, CREIGHTON and BOND, for defendant.

Judge HITCHCOCK delivered the opinion of the court:

The agreed case shows that the legal title to the premises in controversy, or more properly speaking, the right of possession, is in the defendant, unless that title was vested in Watts by the decree of the circuit court. When this decree was made we know not, as it is not before us in the form in which it was entered. It directed Fullerton to convey certain lands, including the premises in controversy. Whether this decree was complied with is not, however, known; but it is supposed that it was not. The simple question, then, presented for determination is, whether a decree of the circuit court of the United States for the conveyance of land, operates as a conveyance; whether by the decree alone, without any further act performed, the title is changed.

Previous to the act of February 19, 1810, "directing the mode of proceeding in chancery," all decrees in chancery rendered by the courts of this state were to be enforced by sequestration or execution; but by section 41 of that act (1 Chase's Stat. 689), it is provided "that where a decree shall be made for a conveyance, release, or acquittance, in either of said courts, sitting as a court of chancery, and the party against whom said decree shall pass shall not comply therewith by the time appointed, then such decree shall be considered and taken in all courts of law and equity to have the same operation and effect, and be as available as if the conveyance, release, or acquittance had been executed conformably to such decree." This same principle has been continued in the statutes to the present time. It is contended by the plaintiff's counsel, that a decree of the circuit court of the *United [273 States must have this effect when made within the district of Ohio. But is it so? Section 1 of the act of 1810, 1 Chase's Stat. 685, gives to the court of common pleas jurisdiction "in all cases properly cognizable by a court of chancery." Section 2 gives the Supreme Court concurrent jurisdiction with the court of common pleas in all cases in chancery where the title to land is called in question, or the matter in controversy exceeds one thousand dollars, and absolute jurisdiction in all cases originating in the court of common pleas. Through the whole law no other courts are referred

to. These are, in fact, the only courts of equity acting by authority of the state. Section 41 refers specifically to the decrees of these courts. The words are, "when a decree shall be made for a conveyance, release, or acquittance *in either of the said courts*," etc. We think that the principle can not, by any rule of construction, be extended beyond those courts.

We know of no law of the United States, giving to the decree of the circuit court this effect; and certainly there is no law of this state for that purpose. The decrees of that court operate upon the person, and will be enforced, as we suppose, like the decrees of the high court of chancery in England, by attachment and sequestration. In the opinion of this court, the decree referred to in the agreed facts did not vest in the lessor of the plaintiff a legal title to the premises; of course a new trial is ordered, the costs to abide the event of the suit.

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HUGH EVANS, FOR THE USE OF D. S. BELL, *v.* MICHAEL INSTINE.

In attachment against an absconding debtor, who has not entered an appearance, and where the attachment was served upon property not owned by the defendant, but withdrawn from the attachment on the suit of a third person, the proceedings are *coram non judice*.

RESERVED in the county of Champaign.

This is an action of debt. The declaration contains two counts:

1. Upon a judgment rendered in the quarterly court of Monongalia county, in the commonwealth of Virginia, at the suit of Evans *v.* Instine, on November 11, 1802, for the sum of fifteen dollars damages, and five dollars and fifty-two cents costs of suit.

2. Upon a judgment rendered in the same court, on the 274] *same day, and between the same parties, in favor of the plaintiff, for eighteen dollars damages, and five dollars forty-two cents costs.

To this the defendant pleaded *nil debet* and two special pleas in bar, which it is unnecessary to notice.

On the trial of the case the plaintiff offered in evidence two transcripts, purporting to be copies of proceedings in the quarterly

court of Monongalia county. From these it appeared that the plaintiff, on November 8, 1802, procured to be issued two writs of attachment against the defendant, by one Nathan Hull, a justice of the peace, first having made oath that the defendant was an absent debtor. These writs of attachment were on the same day executed upon personal property and returned. On the eleventh day of the same month, judgments by default were rendered for the same sums as stated in the declaration.

To show that the property attached had not been appropriated to satisfy the judgments, the plaintiff next introduced a transcript of a proceeding in chancery, commenced on December 15, 1811, in the name of Philip Huffman, against the said Hugh Evans, in which Huffman claimed as his own, the property levied upon in virtue of the attachments, and sought to enjoin Evans from selling the same to satisfy the judgments against Instine. On final hearing, the property was found to be in Huffman, and a perpetual injunction decreed.

The plaintiff having closed his testimony, the defendant moved the court to overrule the evidence and direct a nonsuit, which was done accordingly.

Whereupon the plaintiff moved to set aside the nonsuit, and for a new trial.

D. S. Bell, for plaintiff.

Hamilton, for defendant.

Judge Hitchcock delivered the opinion of the court.

The evidence in this case shows that two judgments were rendered against the defendant, by default, in the quarterly court of Monongalia county, Virginia. It is presumed that the proceedings which resulted in the rendition of these judgments were in conformity to the laws of that commonwealth. *But although [275 these judgments were rendered, still no process had been previously served upon the defendant; he had not appeared in court, nor had any property of his been seized in attachment. Without inquring as to the effect of a judgment in foreign attachment, where the property of a defendant has been taken in virtue of the writ, we are clear in the opinion that where the property of a stranger has

been served upon, such service does not so far give any court jurisdiction, as that a judgment rendered can be of any effect.

The motion is overruled.

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LESSEE OF HENRY HELFENSTINE *v.* JACOB GARRARD ET AL.

English statute of uses, not in force in Ohio at any period of its government

THIS was a motion for the new trial of an action of ejectment, reserved in the county of Madison.

The plaintiff declared upon a demise of Henry Helfenstine. At the trial he produced a patent conveying the land to "Peter Helfenstine, in trust for the heirs and devisees of Peter Helfenstine, deceased," with proof that he was one of the heirs of the decedent; and because the court rejected their testimony, as not establishing a legal title in the heirs of the deceased, P. Helfenstine, he makes this motion for a new trial.

LEONARD and KENT, for plaintiff.

SWAN, for defendant.

Judge LANE pronounced the opinion of the court:

The patent transfers the fee of the land to Peter Helfenstine, in trust for certain heirs, of whom the plaintiff is one. In England the statutes of uses, 27 H. VIII, c. 10, operating upon this state of facts, would invest the *cestui que use* with the legal title. If that statute be in force here, the plaintiff is entitled to recover.

The case is argued by counsel for the plaintiff with great ability; but we are not led to adopt their conclusion. After a political organization, and the administration of justice by courts, 276] within the State of Ohio, for the period of forty-eight *years, we find no traces of the authority of the statute of uses at this time as a rule of property, and no distinction is known in practice between uses and trusts. And none seems necessary, since uses in our construction are not attended with those exceptionable privileges which they possessed in England before the statute

and every quality of trusts is attached to them. Our system of conveyancing, although it has grown out of the English system, does not depend upon the statute of uses, but has taken its form and derives its authority from our own statutes and local usuges. Under these circumstances, the recognition of the power of this statute is not only unnecessary, but would be mischievous, by the introduction of new and complex rules of property. The court unite in opinion that the statute, if ever in force, became so by the statute of 1795, or of 1805, 1 Chase's Laws of Ohio, 190, 512; and was repealed by the statute of 1806, 1 Chase's Ohio Laws, 528, before the date of this patent.

Motion for new trial overruled.

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## A. P. Howell v. Cincinnati Insurance Company.

A loss occasioned by the negligence of the officers of a steamboat is not chargeable to the insurers, unless the policy contains an agreement to insure against barratry.

Conflicting testimony reviewed and its effect considered. New trial not granted where the case went fully to the jury upon the proofs.

If the insured, at the time of taking the policy, suppress any fact material to a just estimation of the risk, or make any untrue representation that affects it, which is not true, the insurers are not bound.

In a suit between the insurers and insured, on a policy in a steamboat, the captain in command, at the time of the loss, is a competent witness.

Verdict between the plaintiff and a different insurer, touching the value of the subject insured, no ground for a new trial.

This cause was adjourned from the county of Hamilton, and came before the court, upon a motion made by the defendant, for a new trial. The action was brought upon a policy of insurance on the steamboat '76. The policy was taken for a year, and bore date December 2, 1831. The loss happened December 2, 1832, about noon. The case is stated at large, as the points made are discussed in the opinion of the court.

H. STARR, C. HAMMOND, and C. J. WRIGHT, for plaintiffs.

FOX, and N. WRIGHT, and HODGES, for defendant.

Judge WOOD delivered the opinion of the court:

The motion for a new trial assigns the following ground:

1. That the verdict is against the law as laid down by the court.

2. That it is against the weight of the evidence given in the cause.

277] *3. That the court erred in admitting the master of the boat as a witness for the plaintiff.

4. Because by the verdict rendered in the suit wherein said A. P. Howell is plaintiff, and the Protection Insurance Company is defendant, upon the same evidence read and adduced in this cause, it is found by the jury that the plaintiff is entitled, as will be insisted, to recover only for a *partial* loss; and if so, then the amount of the recovery, in this suit, must be proportionally released or remitted altogether.

5. That it further appears, by the finding of said jury, in the said suit of Howell *v.* Protection Insurance Company (which finding was subsequent to the verdict between the parties to this suit), that the whole value of the boat, on December 1, 1831, was but eight thousand dollars, and on the day of the alleged loss but six thousand five hundred dollars; and the defendants, thereupon, will insist that the valuation in said policy can be opened up and the actual value fixed by the finding aforesaid.

6. That if said value, as found by said jury, is to obtain in the decision of this cause, then the verdict in this suit is to be modified to meet the state of facts.

The court are asked, if they do not grant a new trial, to reform and modify the verdict, in amount, to suit the facts of the case under the law.

In support of the first and second positions assumed by the counsel for the motion, it is insisted that a loss arising from the negligence or unskillfulness of the captain is not such a loss as charges the underwriter in the ordinary forms of policies unless barratry is insured against; and, as this policy includes no clause against barratry, the underwriters are liable only for losses occasioned by the perils of the river, which skillful and careful men would be subject to. By a reference to the minutes of the judge who presided on the trial, it appears that the law was given to the jury

as the counsel for the motion claim that it is. They were instructed, that before the insurer was to be made liable, they must be reasonably satisfied, from the evidence, that the boat was lost by one of the perils insured against. That the defendant was not liable, under this policy, for any act of barratry, because it was not one of the risks taken. That the plaintiff's counsel relied solely for a recovery on the hypothesis that the boat was lost by one of the perils of the river; and that, by a peril of the river, they were to understand one of those natural perils *and operations of the ele- [278 ments which occur without the intervention of human agency, which the prudence of man could not foresee nor his strength avert. Such a peril was defined in the books a *fortuitous event*—an accident which the circumspection, care, and energy of the human intellect would not ordinarily avoid or resist. That it was against extraordinary perils only that the insurers undertook, and for which alone they were responsible; and it is believed that such instruction is sustained by high authority as the law of the case. Park in his Treatise, Kent in his Commentaries, and Judge Johnson in 3 Peters, fully sustain this principle. The case then went to the jury, upon the question of law, under circumstances as favorable to the defendant as the counsel required.

It is said, however, that the verdict is not supported by the weight of the evidence, under the law, as given to the jury. This is a point much more difficult, at this time, to satisfactorily determine, and must, in some measure, be disposed of from the impression it is recollected that the evidence made on our minds on the trial.

It is sometimes the case, that the belief of the facts sworn to by a witness is much strengthened or diminished by his appearance and manner of giving testimony on the trial. The testimony of a single witness may often obtain credence over twice his number who contradict him, from a knowledge of his character, his appearance and manner, when contrasted with theirs; and although they can not be directly impeached. When such evidence is placed on paper, and the court are to determine where the right of it lies, at a period of several months after it is given, and when the countenance of the witness nor his name can be any longer borne in recollection, we must, in a measure, resort to an impression when everything was fresh in our mind, and be operated on by such consideration.

We are asked, again, carefully to review the testimony, and we have done so. Much of it is in depositions, and full notes were taken of the rest, supposed to be material by the judge. The principal testimony for the plaintiff was the depositions of Briggs, King, Underwood, and the parol evidence of Edwards and Dovenor. Briggs was the captain, Edwards the pilot, and Dovenor the engineer of the '76, and Underwood, the captain of another 279] boat, and, from the evidence, of *undoubted skill and of good character.

These witnesses were called to prove the loss of the boat, by the perils of the river, and they all agreed substantially, in their relation, when testifying about the same fact. They prove some one, or more of them, that the '76 left Randolph in the evening of the first December; that the night was exeedingly dark and rainy; that in coming up the river, the boat struck on Plumb point; that the shock was severe; that neither shore of the river could be seen at the time; that the boat was so injured as to leak and make water fast; was run across the river and lay till morning, the wind being very high. The next morning about sunrise, the boat was gotten under way and proceeded up the river. About ten o'clock, A. M. or a little before, the boat was stopped, wooded, and again proceeded up the river in the usual track of boats navigating the Mississippi, until they struck what they believed to be the wreck of the Daniel Boone. Until this time, the boat was kept clear of water by the pumps. Edwards says he was at the wheel, as pilot of the boat at the time; that he saw the break of the Boone, but not until very close to her. That he was far enough from her to have passed her on the outside, which he intended to do, but a sudden flaw of wind from the west, struck the stern of the boat, threw it farther into the current, and the starboard bow struck the Boone, raked the cotton from stern to stern, glanced to the shore, struck a stump, broke her bowsprit, was backed off and proceeded on her course. That above Buford's landing, by the direction of the captain, he tried to run her on to a bar, but she sheered off, and believing she was in imminent danger, he run her with the current, gradually across the Mississippi into a bend of the river, where she finally sunk, and all the witnesses agree that she could not much longer have been kept above water. This witness says he has no doubt he should have cleared the Boone, had the wind not struck the boat

as he described. Briggs, Underwood, and King gave a minute history of the accident, and concurred in the main with Edwards. It was also shown, beyond question, that much was done, and all that could be reasonably done, to secure and save the boat, when she finally landed; but that she sunk, and was lost between two and four o'clock, on the morning of December 2, 1832, eight hours at least before the policy expired. These witnesses testify to no act in the management of the boat, to shake their faith in the belief that *the boat was navigated with integrity, care, and skill. [280 This testimony, it seems to us, was amply sufficient, not only to justify, but to demand of the jury a verdict for the plaintiff according to the law, as the court gave it to the jury, so far as we have as yet progressed with the case.

We next come to the defense. It was claimed that the boat was lost by an act of barratry. 2. If not by barratry, by such carelessness as should avoid the policy.

Barratry is defined by Park (Park on Marine Insurance, 83, 84), "to be any act of the master, or mariners, of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the owners of the ship, and without their consent, or privity." Other writers say that negligence may be so gross as to be evidence of barratry. Time need not be occupied, however, with the *first* point *here* made by the defense. It was not sustained on the trial, and upon a subsequent trial in the case of this plaintiff *v.* Protection Insurance Company, on the *same evidence*, it was abandoned; and it seems now to be abandoned by the counsel in *this* case. They appear to claim only, that the circumstances proved "*show a wanton degree of carelessness, which ought to avoid the policy.*" It was also claimed on the trial, there was an understanding between the plaintiff and his captain, Briggs, and that the boat was lost by design. It is not now asserted that any evidence looked toward sustaining that position, and the court neither now, nor on the trial, had the least impression that any such fact was proved.

We are left, then, to inquire, whether the evidence of the defendant, shows such neglect or carelessness in the officers and crew of the boat as exempt the insurers from liability.

Many witnesses and much testimony was given for the defendant on this point. It was claimed that the boat, after striking Plumb Point, was no longer seaworthy; and that there were convenient places, where the boat could put in and repaired; and

that by not doing so, the risk was increased, and the underwriters discharged. The court instructed the jury, that there was, in law, in every policy, an implied warranty, that the boat was seaworthy when the policy attached, which meant that the vessel was competent to resist the ordinary attacks of wind and weather, and was competently equipped and manned for the voyage, with a sufficient crew, and with means to sustain them; with a 281] *captain of general good character and nautical skill; and if the ship became unseaworthy, during the voyage, it was the duty of the captain to stop and repair at the first suitable and convenient port; and if he did not, and a subsequent loss ensued, the underwriters would be discharged on the ground of negligence.

Some witnesses testified that the boat might have stopped and repaired between Plumb Point and the wreck of the Boone, but no one stated that there was any place very suitable or convenient, and most of the evidence was that so long as the pumps would keep the boat clear, it was considered safe, and was the usual practice, to keep up the river to a *convenient port* to repair. To the court, the evidence appeared to justify the captain in continuing on his course.

There was much evidence given by the defendant, in relation to the running on the Boone, varying considerably from that given by the plaintiff, and the same may be said of the subsequent conduct of the captain and crew, until the loss of the boat. This evidence, in our view, however, was mostly reconcilable with that given by the plaintiff, and went to the jury, under the instruction that the law made the masters and mariners of vessels agents for the insured, and if loss was occasioned by their negligence, the law discharges the insurers. 5 Ohio, 436. That the insurers did not insure against the negligence or want of skill of the insured or his agents. Such negligence was not covered by the policy. The court instructed the jury further that it was, nevertheless, no defense that a vessel navigated with ordinary care and skill, and by fortuitous events was placed in a perilous situation, and that the captain and officers, in the exercise of a sound discretion, did not take the proper channel, or use proper means to save the boat when she might have been saved if they acted with fidelity. The officers in such case might exercise a sound discretion and are not answerable for the result of their judgment. Under this instruc-

tion, the court are of opinion *that the verdict is sustained by the weight of evidence.*

On the trial, it was claimed by the defendant's counsel that the plaintiff was not the sole owner of the boat, when the policy attached, as he represented himself to the office, and that he misrepresented the value of the boat, she being worth much less than ten thousand dollars. The court instructed the *jury that [282 a contract of insurance was eminently a contract of good faith, which was peculiarly enjoined upon the insured, as he possessed an entire knowledge of all the circumstances which combined to form the contract, and was bound to communicate the facts and objects which were to determine the will of the insurer. It was accordingly an established principle, that a misrepresentation to the underwriter, or concealment of a fact material to the risk, would avoid the policy; that it would avoid it, though the loss arose from a cause unconnected with the misrepresentation; or even though the misrepresentation, or concealment, happened through mistake, neglect, or accident, without any fraudulent intention. That the suppression of any such facts, whether by design, or mistake, or negligence, equally rendered the policy void, for the risk run became different from the one assumed in the policy; that the law required *suprema fides* in the foundation of the contract; and yet, either party might be innocently silent as to ground open to both for the exercise of their judgments. That a misrepresentation as to who are the owners, the captain or pilot, may come within the operation of the rule.

The evidence was, that one Gossage had been a while captain, and said he was a part owner; but it was proved by Gazzam, who knew the contract, and held the obligation, that Gossage was never part owner, because he did not perform the condition which he was to perform, to wit, to pay the note, before his ownership was to commence, and as to misrepresenting the value of the boat, it was proved that the boat was owned in Cincinnati, where all the parties lived, and that one knew the value, probably, about as well as the other. We are confident our impression, at the time was, that the verdict was, on both those points, supported by the evidence, and we still think so. So far, then, as the two first points in the motion are concerned, we are of opinion that the verdict is sustained by the weight of evidence under the law, as given by the court to the jury.

The next point made by the motion is the admission of the captain of the boat, as a witness for the plaintiff. Did the court err? If so, a new trial ought to be granted.

If this witness is incompetent, it must because he is interested in the event of the trial. Such an interest as will exclude him, 283] says Starkie, must be a present, certain, vested *interest, and not uncertain or contingent. 2 Stark. 745. A party has such an interest as will disqualify him, when the necessary legal consequences of a verdict will be to better his situation. 2 Stark. 746.

It is not claimed the witness is interested, unless *he* can use the verdict of Howell *v.* the company in his favor. Suppose Howell had failed in a recovery, and had sued this witness for the loss, could Briggs have used the record in evidence on the trial in his favor? Howell's failure to recover *v.* the company would neither be proved nor disproved by the record to have been occasioned by the negligence or carelessness of Briggs. It might have been on many other grounds, fraud, misrepresentation, concealment, by the plaintiff himself. Suppose then, in this case, Howell, having recovered, should sue Briggs for any amount he may have lost, not covered by the policy; the record is the same, it does not show the fact that the boat was skillfully navigated, unless by implication; but if it did, the record is between other parties, and Briggs could not use it in his favor, unless in mitigation of damages to prevent the plaintiff, so far, from receiving but one satisfaction. But suppose he could use it for this purpose. It is begging the question to say he is interested. Such position assumes that Briggs lost the boat by carelessness, negligence, or some act which makes him guilty and liable, when every legal presumption is clearly the other way. Until his liability is established for the loss of the boat, he is not incompetent; and as that has never been established, and probably never can be, for the best of reasons, that such liability does not exist, the captain must be competent. He has, at most, but an interest in the question which goes to his credibility only.

The next and fourth point made is, that the verdict rendered in a subsequent suit, when Howell was plaintiff, and the Protection Insurance Company, defendant, upon the same evidence adduced in this cause, entitles the plaintiff to recover only for a *partial loss*, and that the amount recovered in this suit should be proportionally released, or remitted altogether.

It appears to us such consequences do not follow. The same evidence which shows a partial loss in the one, shows a total loss in the other case. The policy did not expire in this case until noon, December 2, 1832, and the boat went down, and was wholly lost, eight hours before.

The fifth reason can not be sustained. The court can not *open up the policy because the jury, in a subsequent case, [284 between other parties, have found that the boat was worth but eight thousand dollars when she was insured for ten thousand dollars; or that she was worth but six thousand five hundred dollars when lost. This case is on a *valued policy;* the jury have by their verdict, in substance, found that there was no misrepresentation or concealment by the plaintiff to the office, and the value the parties fixed upon the boat is, in this case, conclusive.

On the sixth reason urged, we will only remark that on full consideration we are of opinion that the verdict of the jury ought not to be modified, nor in any manner interfered with, but that judgment should be entered thereon for the amount found for the plaintiff, and judgment will accordingly be entered for five thousand one hundred and fifty-six dollars and sixty-seven cents, the balance due after deducting the premium note to May 1, 1835, being the first day of the term.

Judgment for five thousand one hundred and fifty-six dollars and sixty-seven cents.

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ABRAHAM P. HOWELL *v.* THE PROTECTION INSURANCE COMPANY.

If a vessel insured receive an injury that occasions her total loss, before the expiration of the policy, but is not lost within its existence, the insurers are liable only for the actual injury within the time of the policy.

Insurance upon an estimated value, without proof of fraud, concludes the parties to the policy.

THIS cause was adjourned from the county of Hamilton, and came before the court upon a motion of the defendant for a new trial, and a motion of the plaintiff for judgment on the special verdict. The suit was instituted on a policy of insurance on the steamboat "Seventy-six," dated December 1, 1831, and to expire, by its terms,

on December 1, 1832, at twelve o'clock. This policy insures three thousand dollars on the boat, valued at ten thousand dollars. The policy stipulated that, if a prior insurance was made elsewhere on the boat, it should be indorsed, and the amount to be paid in case of loss, should be such proportion thereof as the sum herein insured is to the whole sum at risk.

The defense set up at the trial was, that the loss did not happen within the time of the policy, and that it was occasioned by negligence in navigating the boat. At the suggestion of the counsel for the defendant, the jury found the following special verdict:

The jury find that the defendants did execute the policy of 285] *insurance described in the declaration, and do further find that A. P. Howell was the sole owner of the steamboat "Seventy-Six," when she was insured and when lost.

That no other person owned any part of the steamboat Seventy-Sin, except A. P. Howell, at any time.

That the value of the steamboat Seventy-Six, at the time she was insured, was eight thousand dollars.

That the striking of the boat on the wreck of the Daniel Boone was not owing to negligent or unskillful navigation, but one of the casualties of the river.

The boat received her injury at half past ten or eleven o'clock A. M., on what was supposed to be the wreck of the Daniel Boone, on December 1, 1832.

That she landed between one and two o'clock P. M., where she finally sunk.

That she sunk between two and four o'clock on the morning of December 2, 1832.

That the value of the boat when she struck the Daniel Boone was sixty-five hundred dollars.

That the steamboat Seventy-Six was not damaged to half the value of the boat at twelve o'clock, but at the same time, that her striking the wreck of the Daniel Boone occasioned her loss finally.

That the amount of damage was three thousand dollars, at the time she struck the Daniel Boone.

That they can not tell the amount saved by the evidence we have, but guess three hundred dollars or more might have been saved.

That the boat might have been run on a bar, or to a landing,

and probably have saved the engine and furniture, but that the officers did what they thought best for the safety of the boat.

That she had a full crew.

That the holes in her did not make her unworthy.

That there were holes in her when insured.

That there was a hole made in her at Louisville, when repairing.

That the holes in her did not increase the risk materially.

And if, upon this finding, the court is of opinion the law is with the plaintiff, we find for the plaintiff and assess him such damages as in law he is entitled to on the facts. But if the court is of opinion, that on these facts the law is with the defendants, then the jury find for the defendants.

*The plaintiff's counsel moved for judgment on the verdict [286 for the whole sum insured.

The defendants' counsel moved for a new trial, on the ground that the finding of the jury was against the weight of evidence given in the cause. And, also, on the ground that the court erred in charging the jury, that, if the injury that occasioned the loss occurred within the time of the policy, the insurers were liable for an average loss, although the total loss did not happen until after the policy had expired.

FOX, for the defendant, argued at large the motion for a new trial, on the weight of evidence.

WRIGHT and WALKER, on the same side, insisted, that as the loss was found not to have happened, equal to one-half the value, until after the expiration of the policy, the defendants were not liable at all. They cited 1 Term, 187, 252; 3 Kent's Com. 308, 2 ed.; 1 Phil. Ins. 283; Peters v. Phœnix Ins. Co., 3 Serg. & Rawle, 25.

N. WRIGHT and HODGES, on the same side:

All the counsel for the defendant maintained that upon the special verdict, the plaintiff could only recover an average of three-tenths of the actual loss. This actual loss, within the time of policy, was less than one-half the estimated value, being as three to ten, and this average would give only nine hundred dollars.

H. STARR, HAMMOND, and C. J. WRIGHT, for plaintiff.

Judge Wood delivered the opinion of the court:

This cause was tried upon the same evidence, and the same charges to the jury, on which the case of Howell *v.* The Cincinnati Insurance Company was tried and decided. We have considered the two cases together, and the opinion, in the latter case, is decisive of the motion for a new trial in this, on the ground that the verdict is against the weight of evidence.

The jury find that the injury that occasioned the loss occurred within the time of the policy, and that its extent, at the time of its occurrence, was three thousand dollars. The law seems to be 287] well settled, that if a ship receive her death wound **before*, and is not lost until *after* the policy expires, the insurer is not liable. Park, 433; 1 Term, 260. Justice Lawrence says it is of little importance which way the rule is, but it should be certain and he holds it well settled as stated.

There was then but a partial loss within the time of the policy That partial loss the jury find was three thousand dollars, exactly the sum insured, and less than half the sum at risk, which is ten thousand dollars. The jury find different values of the boat; but that finding does not affect the case. The parties agreed upon a value, and thus made an estimated policy, which is not to be opened where there is no proof of fraud. This estimate concludes the parties in fixing the average loss. This average is three-tenths of three thousand dollars, amounting to nine hundred dollars. The deductions agreed upon reduce this sum to six hundred and eighty-eight dollars and fifty cents, for which judgment is to be entered.

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# PART II.

# CASES

DECIDED BY THE

# Supreme Court of Ohio,

## IN BANK,

## AT DECEMBER TERM, 1836.

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PRESENT:

EBENEZER LANE,
REUBEN WOOD,
PETER HITCHCOCK,
FREDERICK GRIMKE,
} JUDGES.

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JOHN G. FULTON AND WILLIAM R. FOSTER *v.* THE LANCASTER (OHIO) INSURANCE COMPANY.

A policy of river insurance containing no clause against barratry does not cover a loss, the remote cause of which is the negligence of the master or crew. Cases on this subject reviewed.

THIS cause was adjourned from the county of Muskingum. The points in discussion, and the form in which the case came up, are fully stated in the arguments of counsel and the opinion of the court.

GODDARD and CONVERSE, for plaintiffs:

This is an action of assumpsit on a policy of insurance, dated March 16, 1836, whereby the defendants caused the plaintiffs "to be insured five thousand dollars, on a flat-boat and cargo, at and from Duncan's Falls to New Orleans; that is, four thousand eight hundred dollars on the cargo, consisting of eight hundred barrels of flour, and two hundred dollars on the boat." The boat, with the cargo on board, left Duncan's Falls, and while proceeding on the voyage was wrecked on Cheadle's island, in the Muskingum river.

At the trial on the circuit the evidence showed, in the opinion 6] of the court, that the loss might have been avoided, *but for the want of ordinary care and attention on the part of the captain and crew, at the time when the boat, in making a bend of the river, came in sight of the island, and a short time before the loss occurred. The jury found a verdict for the plaintiffs for the sum of one thousand seven hundred and seventy-nine dollars and thirty-four cents. The defendants moved for a new trial, on the ground that the verdict was against evidence, and this motion was reserved by the court for decision in bank.

The case presents this question: Is a loss of property insured, the immediate cause of which loss is one of the perils insured against, and the remote cause the negligence or carelessness of the captain or crew, covered by the policy, and such as will charge the insurers?

The clause in the policy material to the decision of this question is as follows: "Touching the adventures and perils which the said insurance company are contented to bear and take upon themselves in the premises, they are of the *rivers, fires, enemies, pirates, rovers, assailing thieves, and other perils, losses, and misfortunes which shall come to the damage of the said boat and cargo, according to the true intent and meaning of this policy, as herein expressed.*" The plaintiffs claim that the captain and crew, being competent in skill and in numbers *at the time when the risk attaches and the vessel sails*, the insurers are liable for a loss arising *immediately* from any of the perils enumerated in the policy; although the *remote* cause of such loss may be traced to the *negligence* or *carelessness* of those intrusted with the management of the vessel. If the defendants are not liable, it is because of an implied warranty that the captain and crew shall possess and *exercise* ordinary skill and care

*during the whole voyage.* We contend that the extent of the engagement of the insured is, that the captain and crew shall be competent in skill and sufficient in numbers *at the time* the risk attaches and *the vessel sails.* The only warranty implied by law, on the part of the insured, is, that the vessel shall be *sea-worthy.* By the warranty of sea-worthiness, he undertakes that the vessel shall be stout, staunch, and tight; have sufficient stores and supplies; a captain possessing a capacity for the particular voyage, and skill in his profession, and a competent number of men for the management of the vessel. 1 Philips on Ins. 113, 114; 3 Kent's Com., 2d ed. 287. And this warranty of sea-worthiness relates to *the time of the commencement of the risk and sailing of the vessel.* Peters *v.* Phœnix Ins. Co., 1 Bin. *592; 3 Serg. & [7 Rawle, 25; 3 Kent Com. 287, 288; Busk *v.* Royal Ex. Ins. Co., 2 Barn. & Ald. 83; Crader *v.* Phil. Ins. Co., 2 Wash. 262.

In respect to the construction of a warranty of sea-worthiness in a policy on *cargo* and freight, it has been held to be the same as in a policy on a ship. 2 Phil. Ins. 106. "The construction of the implied warranty is the same on the question respecting the *goods* and freight, as it is respecting the vessel," per Sewell, J., in Taylor *v.* Powell, 3 Mass. 331. "The implied warranty is the same in an insurance on goods and freight as it is on an insurance upon the *vessel.* It is, that the vessel shall be in a navigable state *at the time she sails,*" per Wilde, J., in Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56.

These authorities clearly show that the requisition that the boat shall be provided with a sufficient and competent crew, is a part of the implied warranty of sea-worthiness; and that such warranty relates to the *time of the departure of the boat* from the place where the risk attaches, and is NOT *a continuing warranty during the whole voyage.* And is there not sound reason for this limitation? The object of a person in effecting an insurance, is to have the insurers protect him from losses against which, after he has done all that he can do, he can not protect himself. He is held liable, therefore, for any loss that may arise by reason of his intrusting incompetent or careless men with the management of his boat, because he might have protected himself against such loss, by selecting competent and careful persons. He is liable if his boat be not properly constructed and of sufficient strength for the voyage on which she is about to depart, because he has it in his power to prepare and fit her out properly before she sails. But after he

has done all this, and the boat takes her departure and is out of his sight, he can not reasonably be required to do more. He has no power to prevent the occasional negligence of the captain or crew more than the insurers themselves have. They are beyond his reach. He has done all that he could do to secure skill, care, and attention, *during* the voyage, by selecting those who have the reputation among men, best acquainted with the business, of being skillful, careful, and attentive. And this is all the security which the insurers can require, or the insured can give, that the voyage will be carefully and prudently conducted. There is a risk that the vessel may be lost, after the owner has done every-
8] thing he can do. *This risk* he would *guard against by taking a policy. He takes a policy—pays the premium—and has asked the insurers to protect him from loss, for the very reason that *he can do nothing more* to protect himself.

Again, the loss for which the insurers are liable must be a loss occasioned *immediatety* by the perils insured against. *Causa proxima, non remota, spectatur;* and this is adopted as a settled rule, to prevent uncertainty and dispute. 3 Kent's Com. 302; Walker *v.* Maitland, 5 B. & A. 171; S. C., 7 Eng. Com. Law, 59.

The contract of insurance is a commercial contract. Its great benefit to the insured is, that if loss happen his business will not be embarrassed or broken up. He can be immediately reinstated in his capital, without delay or prejudice to his mercantile arrangements. To effect this, the insurers must act *promptly*. There should be as little uncertainty as possible as to the losses for which they were liable. To this end, the rule is firmly established, which looks to the *proximate cause alone*. If a different rule be adopted, Abbott, Ch. J., says: "It will introduce an infinite number of questions as to the *quantum* of care which, if used, might have prevented the loss. *I am afraid of laying down any such rule.* Walker *v.* Maitland, 5 B. & A. 171; S. C., 7 Eng. Com. L. 61." If the rule, which regards only the proximate cause, be departed from, and the party permitted to *speculate* as to the remote causes of the loss, no general and certain rule can be laid down by the court. Each particular case must furnish a rule for itself; and what that rule is, can only be known with certainty *after the case is decided.* What loss ever took place that could not be traced back, *after it had happened*, to carelessness or negligence

in a greater or less degree? At what link in the chain of causation can the court say the inquiry shall stop?

The defendants rely on the case of Lodwicks et al. *v.* Ohio Ins. Co., 5 Ohio, 433, decided by this court in 1832. The court are respectfully asked to consider the question and review the opinion pronounced in that case.

The same question has been recently decided by the courts of England, and by the Supreme Court of the United States, in cases not presented to this court when the question was discussed in 1832.

The case of Lodwicks et al. *v.* Ohio Ins. Co. declares that "no doctrine is better settled, than that the insurer is not *lia- [9 ble under the common clause in the policy for losses resulting from negligence of the agents employed by the insured. 5 Ohio, 435. The authorities referred to, in the opinion of the court, are Grim *v.* Phœnix Ins. Co., 13 Johns. 451; Phil. on Ins. 224, 225; Tate *v.* Levi, 14 East, 481; Cleaveland et al. *v.* Union Ins. Co., 8 Mass. 321; Hodson *v.* Malcolm, 5 New R. 336; 9 Johns. 21. The decision professes to be founded upon *both* the English and American cases. Now it is respectfully submitted to the court, that of all the cases cited, the New York decisions *alone* sustain the rule laid down by the judge who pronounced the opinion of the court. The case cited from 8 Mass. 321, furnishes nothing more than the *dictum* of Sedgwick, J.

That the law, as settled in *England* and by the *Supreme Court of the United States*, is *against* the rule laid down in the case decided by this court, will appear from the following cases:

Busk *v.* Royal Ex. Ins. Co., 2 B. & A. 72. In this case the loss arose from the negligence of the mate, in lighting a fire in the cabin and not seeing that it was properly extinguished. The case was elaborately argued by Campbell, for the plaintiff, and Bosanquet, for the defendant, on a motion by the *plaintiff* for a *new trial*, the jury having found a verdict for the defendants. Bayley, J.: "The question which the facts of this case present for the consideration of the court, is whether the underwriters, on a policy of insurance on a ship, are liable for a loss by fire, that fire having arisen from the negligence of the person who, at the time of the loss, had the charge of the vessel. The policy expressly throws upon the underwriters the liability proceeding from fire, barratry of the master and mariners, and all other perils, losses, and mis-

fortunes that should come to hurt, detriment, or damage of the ship." The object of the assured certainly was to protect himself against all the risks incident to a maritime adventure. The underwriter being therefore liable, *prima facie*, by the express terms of the policy, it lies upon him to discharge himself. Does he do so by showing that the fire arose from the negligence of the master and mariners? If the ship had been willfully set on fire it would have been barratry, and the underwriters would be liable; but it has been argued that the underwriters are only liable for loss by barratry because that is one of the risks expressly mentioned in 10] the policy, and that the *negligence of the master and mariners not being a risk expressly described in the policy, the underwriters are not liable for a loss thereby occasioned. In this case, however, the loss is occasioned by *fire*, against which the assured is protected by the terms of the policy; and in our law, at least, there is no authority which says that the underwriters are not liable for a loss, the proximate cause of which is one of the enumerated risks, but the remote cause of which may be traced to the misconduct of the master and mariners. If, indeed, the negligence of the master would exonerate the underwriter from responsibility in case of a loss by fire, it would also do so in cases of loss by capture, or perils of the sea, and it would therefore constitute a good defense in an action on a policy to show that the captain had misconducted himself in the navigation of the ship, or had not resisted an enemy to the utmost of his power. It is certainly a strong argument against the objection, now raised for the first time, that in the great variety of cases upon marine policies which have been the subjects of litigation in courts of justice (the facts of many of which must have presented a ground for such a defense), no such point has ever been made." Ib. 79, 80. The learned judge then reviews the opinions of foreign writers, referred to by counsel in the argument, and proceeds: "The fair result, therefore, of all these authorities [*i. e.*, Emerigon *and other foreign writers*], is this, that the underwriters are liable for a loss by fire occasioned by the negligence of the master and mariners, provided they insure against barratry, that term being by the *French* writers used in its larger sense, as comprehending negligence as well as willful misconduct; but inasmuch as the term barratry is used in our policies in a more limited sense, as applicable only to the willful misconduct of the mariners, the authority of Emerigon

affords no ground for our decision in this case. We must, therefore, endeavor to collect the meaning of the contracting parties from the terms of the policy itself; and in considering whether the assured, claiming for a loss by fire, is to have that claim disallowed on the ground that the fire was occasioned by the misconduct of the master, we must look to the other terms of the policy, and learn from them whether the assurers in other instances are responsible for the misconduct of the master; and when we find that they make themselves answerable for the willful misconduct of the master in other cases, it is not too much to say that they meant to *indemnify the assured against fire proceeding from [11 the negligence of the master and mariners. I am, therefore, of opinion in this case that the assured are entitled to recover as for a loss by fire, although that fire was produced by the negligence of the person having the charge of the ship at the time. It has been argued that in this case there was a breach of an implied warranty; and that there being no person on board of the vessel at the time of the loss, she was not properly manned, and consequently not sea-worthy. The owner certainly is bound, in the first instance, to provide the ship with a competent crew, but he does not undertake for the conduct of the crew in the subsequent voyage." Ib. 82, 83. "In Tait *v.* Levi," one of the cases cited by Judge Wright, "there was a breach of the implied warranty, to *provide* a master of competent skill; I therefore think that the plaintiff, from the facts stated in this case, was entitled to recover, and that there must be a new trial. Abbott and Holroyd, Js., concurred. Ib. 83. *Rule absolute for a new trial.*

The next case is that of Walker *v.* Maitland, 5 Barn. & Ald. 171; S. C., 7 Eng. Com. Law, 39. In this case, the plaintiff effected a policy of insurance, in the common printed form, *on boats belonging to the ship Britannia, and on produce in said boats, or in any other craft employed in loading such ship.* A certain sloop called the *Vigilant* was employed to bring produce to the *Britannia.* The sloop was sufficiently manned; and if the mate and other persons *had done their duty*, the sloop, with the produce thereon, would safely have reached the ship. About eight in the evening the mate lay down to sleep, leaving the charge of the watch to one of the seamen, another having the helm; and soon after the mate went to sleep, *the whole of the watch on duty went to sleep also.* The sloop being left to herself, soon run ashore and was beat to

pieces, whereby a part of her loading was lost, and the rest damaged. *The loss arose from the misconduct and negligence of those on board* the sloop. There was also a loss of a hogshead of sugar from the long boat of the ship, the boat having been driven on the breach and wrecked, by *the mismanagement of those on board thereof*, and the hogshead of sugar entirely washed out. If the boat's crew had done their duty, the boat would safely have reached the ship with the hogshead of sugar; and the loss thereof arose from the negligence of the boat's crew. Upon these facts, an 12] award was made in favor of the plaintiff. A *rule *nisi* having been obtained in Hillary term, for setting aside the award, the court, on cause being shown, ordered the award to be stated in a case, for their opinion.

Campbell, for the plaintiff, relied on Busk *v.* Royal Exchange Insurance Co., *ut supra*. Pollock, *contra*, cited, among others, Tait *v.* Levi.

Abbott, C. J. "I am of opinion that the plaintiff is entitled to recover. The subject of this insurance was very special; it was on boats belonging to the ship *Britannia*, and on produce in said boats, or in any other craft employed in loading the ship, during her stay at *St. Kitt's*. No doubt the owner, under this policy, expected to be indemnified against the loss in question. The words of the policy are very large, and although it may appear extraordinary, that the underwriters should undertake to indemnify the assured against the negligence of the master and crew, which is a species of misconduct on their part, yet it is clear that they do so in the case of barratry, which is the highest species of misconduct of which the master and crew can be guilty. In this case, the immediate cause of the loss was the violence of the winds and the waves. No decision can be cited, where, in such a case, the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule; it will introduce an infinite number of questions, as to the *quantum* of care, which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the mast-head, to look out, and he fall asleep, in consequence of which, the vessel runs upon a rock, or is taken by the enemy; in that case, it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and that the underwriters were not liable. These and a

variety of other such questions would be introduced, in case our opinion were in favor of the underwriters. I can not distinguish this case from that of Busk *v.* Royal Exchange Insurance Co.; there the immediate cause of the loss was fire, produced by the negligence of one of the crew; yet the underwriters were held to be liable. Here the winds and waves caused the loss, but they would not have produced that effect, unless there had been neglect on the part of the crew. I think the underwriters are liable for the loss that has arisen in this case."

Bayley, J. "Here the loss arose from the sloop with the goods *on board, having been beat to pieces by the force of the [13 winds and waves; and the question in this case is, whether the underwriters are exonerated from the loss, by proving negligence on part of the crew, although the damage was occasioned by the perils of the sea. It is the duty of the owner to have the ship properly equipped, and for that purpose it is necessary that he should provide a competent master and crew, in the first instance; but having done that, he has discharged his duty, and is not responsible for their negligence, as between him and the underwriters. If that were not considered to be the law, the question must have frequently arisen, whether there had been proper care and attention, by the master and mariners. It is now, however, raised almost for the first time. I am of opinion, that in this case the underwriters are liable."

Holroyd, J. "The rule of law is, that *proxima causa, non remota, spectatur*, and here the proximate cause of the loss was the peril of the sea. The question is, whether the underwriters are liable for a loss proceeding directly from a peril of the sea, but remotely from the negligence of the crew. The underwriters engage to be responsible for the barratry of the masters; they therefore engage to be responsible for the highest species of misconduct. This case can not be put on the ground of the breach of the implied warranty to provide a master and crew of competent skill. It is sufficient if the owners provide a master and crew generally competent. There is no implied warranty that such a crew shall not be guilty of negligence. I therefore agree with the rest of the court, that the rule for setting aside the awards must be discharged." Rule discharged.

Bishop et al. *v.* Pentland, 7 Barn. & Cress. 219; S. C., 14 Eng. Com. L. 33. *Assumpsit* on a policy of insurance, on goods war-

ranted free from average, unless general, or *that the ship should be stranded.*

Bayley, J. "There are two questions in this case. First, was the ship stranded? Secondly, was there such negligence in the master and mariners of the vessel as to exonerate the underwriters from the loss? The cases of Busk *v.* Royal Exchange Assurance Company, and Walker *v.* Maitland, establish as a principle that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause 14] may be traced to the conduct *of the masters and mariners. Assuming, therefore, that those who had the care of the ship were guilty of negligence, in not providing a rope of sufficient strength to fasten the vessel to the shore, and that their negligence was the remote cause of the loss; still, if the proximate cause was a peril insured against, the plaintiffs are entitled to recover."

Holroyd, J. "It is clearly established, that if there be an actual stranding, although it arise from the negligence of the master and mariners, the underwriters are liable." Postea to the plaintiff.

The same doctrine, that negligence furnishes no defense, was recognized in Smith et al. *v.* Scott, 4 Taunt. 126, and affirmed in Holdsworth et al. *v.* Wise et al., 1 Man. & Ryl. 673; S. C., 17 Eng. Com. L. 283; Philips *v.* Headlan, 3 Barn. & Ad. 380; S. C., 22 Eng. Com. L. 104.

Judge Wright, in delivering the opinion of the court in the case of Lodwick et al., says, "In all such cases, the insured is held liable in law impliedly to warrant that those persons he employed shall be careful and diligent, and that *everything* SHALL *be done* to prevent loss within the reach of ordinary human agency." 5 Ohio, 435. He here assumes that the warranty of sea-worthiness (for that is the only warranty the law implies) *continues during the voyage.* The authorities already cited, clearly show that this warranty relates only to the time the risk attaches and the vessel sails. In addition, however, we would refer to the note in 17 Eng. Com. L. 286, where Bayley, J., is reported to have said that in the case of Shore *v.* Bentall (not reported) "the court were unanimous in thinking that the implied warranty of sea-worthiness did not extend to the ship being sea-worthy, at any port from which one might depart," after leaving the port at which the risk attached.

The case of Lodwick et al. goes to the extent of discharging the insurers from all losses, for which a carrier would be liable. Wright J., says "the common law rule determines all those things negligence, which do not proceed from the enemies of the state, or the act of God. These latter are technical terms, the meaning of which is settled by repeated judicial decisions. If proper care and diligence would have avoided the act, it is not excusable as the act of God." 5 Ohio, 436, 437. If the learned and acute judge intended to lay it down *as law, that all losses, which would [15 *charge* the carrier would *discharge* the insurers, the position can not be maintained. A carrier has an insurable interest in the goods committed to his charge. 2 Phillips on Ins. 47; De Forest *v.* Ful. Fire Ins. Co., 1 Hall's S. C. (N. Y.) 100. And he may insure *generally*, without describing his interest *as carrier*. The case of Crowly et al. *v.* Cohen, 3 Barn. & Ald. 488; S. C., 23 Eng. Com. L. 125, is conclusive on this point. It was an action on a policy, on goods generally, on board canal-boats. The plaintiffs were *carriers*, by canal-boats; but that fact did not appear in the policy. One of their boats, on which they were carrying the goods of a third person, was sunk in the canal. The goods were damaged and the plaintiffs, in consequence, *were obliged to make compensation to the owners*, and were also put to other expenses. At the trial before Lord Tenterden, C. J., a verdict was taken for the plaintiffs, subject to the opinion of the court; it was afterward held by Lord Tenterden, C. J., and Littledale, Park, and Patterson, Js., that the plaintiffs were entitled to recover. In this case the very loss for which the plaintiffs recovered, was a loss for which, as *carriers*, they were liable, and for which *as carriers* they had paid.

From these authorities it is clear that the *English* courts sanction no such doctrine, and sustain no such reasoning as that contained in the opinion of Judge Wright. In that opinion Phillips on Insurance was cited in its support. 2 Phillips on Insurance [published 1834], 82; also Hughes on Insurance, 164, 165, chap. 9, may now be referred to to show that negligence furnishes *no* defense. That opinion can rest only on the *New York* decisions and the *dicta* of the judges of the Massachusetts court, called forth by those decisions. The case of Grim *v.* Phœnix Ins. Co. decides that the insurers are *not* responsible for the fault, negligence, or mismanagement of the master or mariners, not amounting to *bar-*

*ratry*, and that a loss occasioned by the *mismanagement* of the master or mariners, does not amount to *barratry;* and Chancellor Kent lays it down, in accordance with the *New York* authority, that the ignorance, or inattention of the master, or the mariners, is not one of the perils of the sea, and that therefore the insurers are not liable for a loss occasioned by such ignorance or inattention. 3 Kent's Com. 299. But, in speaking of Busk *v.* Royal Assurance Company, in the second edition of his Commentaries, 16] *he says, that this decision is subsequent to that of Grim *v.* Phœnix Ins. Co. 3 Kent's Com. 2 ed. 304, and in note *g*, on same page, he refers to Patapsco Ins. Co. *v.* Coulter, 3 Pet. S. C. 222, and says, "the decision was according to the *English* rule, that where the policy covers the risk of barratry, and fire is the proximate cause of the loss, the insurer is liable, and the defense that negligence was the remote cause, is inadmissible. *The weight of authority is, therefore, decidedly against the New York decision.*" 3 Kent Com.'s 304, note *g*.

But the counsel for the defendants contend that inasmuch as *barratry* is not one of the enumerated perils, in the present policy, the defense of negligence is admissible, and in support of that defense, the cases of Patapsco Ins. Co. *v.* Coulter, in 3 Pet., and of Howell *v.* Cin. Ins. Co., 7 Ohio, 276, are relied upon. We contend, that so far as the question of negligence is concerned, it is immaterial whether *barratry* be named as one of the perils or not, because *barratry* does not embrace *negligence.* It is defined by Chancellor Kent, to be *fraudulent* conduct on the part of the master or mariners, to the injury of the owner, and without his consent. It includes every breach of trust committed with *dishonest* views. 3 Kent's Com. 305. The definition in Abbot on Shipping, 138, is substantially the same. In the case of Earle *v.* Bowcraft, 8 East, 126, Lord Ellenborough went into a full definition of barratry, and he defines it to be "a breach of duty in respect to the owners, with *criminal* intent, or *ex maleficio.*" Judge Story, in his edition of Abbott on Shipping, 138, n. 3, says, that "the doctrine of Earle *v.* Rowcraft, has been admitted into our commercial law." *Vide* cases there cited. Indeed, the case of Grim *v.* Phœnix Ins. Co., upon which the defendants rely, declares "it to be well settled, that an act, to be *barratrous*, must be done with a *fraudulent intent*, or *ex maleficio.* Barratry is a *fraudulent* breach of duty, in respect to owners. *This is the established doctrine, both in the English courts*

*and our own*," per Thompson, J., and it was upon the *very ground* that barratry extended *only* to cases of *fraudulent* intent, that the insurers were held not to be liable in that case; barratry being one of the perils insured against, and the loss having arisen from negligence, and *not fraud*.

The opinion of Mr. Justice Bayley, in the case already cited, from 2 B. & A. 72, shows that the term, as used by the *French* *writers, and extending to *fault* as well as *fraud*, has never [17 been adopted by the English law. *Vide* also 2 Phil on Ins. 181, 182, where it is said, "If the English and American definition of barratry is adopted, and it be limited to cases of fraud, or of negligence and mismanagement, so gross as to bear a fraudulent character, then, the underwriters may be liable for losses by the perils insured against, occasioned by the carelessness, negligence, mistakes, and imprudence of the master and crew, though barratry is not one of the perils insured against. If underwriters are to be held liable for the losses in question (*i. e.*, losses by negligence, etc.), their liability would seem to rest upon this ground (*i. e.*' that the perils insured against are the proximate cause of the loss), whether the policy covered barratry or not, *since it would be going a great length to put a new construction upon the peril of barratry*." But the Supreme Court of the United States has decided the precise question now before the court. At its last term, it was decided, that a loss by fire, occasioned by the mere fault, or negligence, of the assured, or his agents or servants, and without fraud or design, is a loss, within the policy, upon the general ground that fire is *the proximate cause* of the loss, and that, too, *although the policy does not cover barratry*." Columbia Insurance Co. of Alexandria *v.* Lawrence, 10 Pet. S. C. 508. The opinion of the court was delivered by Mr. Justice Story. He says (p. 517): "The next question is, whether a loss by fire, occasioned by the fault and negligence of the assured, their servants and agents, but without fraud or design on their part, is a loss for which the underwriters are liable. In regard to *marine* insurances, this was formerly a question much vexed in English and American courts. But in England the point was completely settled, in Busk *v.* Royal Exchange Insurance Co., 2 Barn. & Ald. 82, upon the general ground that *causa proxima, non remota, spectatur;* and therefore, that a loss, whose proximate cause is one of the enumerated risks in the policy, is chargeable to the underwriters; although the remote cause may be traced to

the negligence of the master and mariners. Although in the policy, in that case, the risk of the barratry was also assumed by the underwriters, *yet it is manifest that the opinion of the court proceeds upon the broad and general ground.* The same doctrine was afterward affirmed in Walker *v.* Maitland, 5 Barn. & Ald. 171, and 18] Bishop *v.* Pentland, 7 Barn. & Cress. *219, and is now deemed *incontrovertibly established.* The same doctrine was discussed and adopted by this court, in the case of the Patapsco Insurance Co. *v.* Coulter, 3 Peters, 222."

In the case of Howell *v.* Cincinnati Ins. Co., it appears from the report, (7 Ohio, 277,) that the question was not properly presented for decision by the court in bank. Wood, J., who delivered the opinion of the court, says, "By a reference to the minutes of the judge who presided on the trial, it appears that the law was given to the jury, as the counsel for the motion claims that it is." And after stating the law, as given to the jury, he concludes by saying "that Park, in his Treatise, and Kent, in his Commentaries, and Judge Johnson, in 3 Peters, fully sustain the principle laid down. The case then went to the jury, under circumstances as favorable as the counsel of the *defendant* required." Ib. 278. The Supreme Court of the United States have, in the case just referred to, in 10 Peters, put their construction on the case of 3 Peters (cited in the case of Howell *v.* Cincinnati Ins. Co., and declaring it to be *immaterial whether the policy cover barratry or not*, proceeded on the general ground, that *causa proxima, non remota, spectatur;* and held that a loss, whose proximate cause is one of the enumerated risks, is chargeable to the underwriters although the remote cause may be traced to the fault and negligence of the assured, their servants or agents. Will the defendants say that the losses in the cases in Peters' Reports were losses by *fire*, and are, therefore, distinguishable from the case now before the court. We apprehend that when the loss arises from *any* of the perils enumerated in the policy, whether that peril be *fire or water*, the rule as to negligence must be, and is the same. In the case of Walker *v.* Maitland, already cited, in which the loss was occasioned by the boat running ashore, where she was beat to pieces, Abbott, C. J., says, "I can not distinguish this case from Busk *v.* Royal Assurance Co., there, the immediate cause of the loss *was fire*, produced by the negligence of the crew. Yet the underwriters were held to be liable. Here, the *winds* and *waves* caused the loss, but they would not have pro-

duced that effect, unless there had been neglect on the part of the crew. I think that the underwriters are liable for the loss." 7 Eng. Com. Law, 61. Phillips says: "There seems *to be no [19 ground to distinguish the case of *fire* from *any other peril* covered by the policy." 2 Phil. on Ins. 182.

Another question was reserved in this case, which depends on the construction of the following clause contained in the policy: "If the boat and cargo should stop, and the interest therein be changed, at or before reaching Louisville, one and one-fourth per cent. of the premium shall be returned."

The premium paid was two per cent., and amounted to two hundred dollars. The jury, in their verdict, allowed the plaintiffs the one and one-fourth per cent., being the sum of one hundred and twenty-five dollars, the boat and cargo having stopped, and the interest therein having been changed before reaching Louisville, by a sale of the same at Cincinnati.

The defendants stipulate that there shall be a return of a part of the premium in the event of a change of interest; and *point out no particular mode* by which that change shall be effected. They must, therefore, be understood as engaging to make such return when the change of interest takes place from any cause whatever.

The plaintiffs, therefore, ask judgment for one thousand seven hundred and seventy-nine dollars thirty-four cents, the amount found by the jury, with interest thereon from the 29th day of October, the day on which the verdict was rendered.

H. STANBERY, in reply:

This was a marine policy against the *perils of the rivers*, upon boat and cargo, from Duncan's Falls, on the Muskingum, to New Orleans, without any clause against barratry or negligence.

1. The principal question reserved for decision is whether the founder of the boat, occasioned by the want of ordinary care in the master or hands, is within the policy.

This identical question was settled by this court, against the assured, in Lodwick *v.* Kennedy, 5 Ohio, 434, and affirmed on the circuit, by Judges Lane and Wright, in Gazzam *v.* Ohio Insurance Co., Wright's S. C. 202, and by this court in Howell *v.* Cincinnati Insurance Co., 7 Ohio, 276.

The plaintiffs ask the court to reconsider the question, and

claim that these decisions establish a rule contrary to the English and American cases, especially to some of the latter cases in both countries, which were not before the court when these decisions were had. These late cases are Busk *v.* Royal Exchange In-
20] surance Co., 2 Barn. & Ald. 72; Walker *v.* *Maitland, 5 Barn. & Ald. 171; Bishop et al. *v.* Pentland, 7 Barn. & Cress. 319, in England; and Columbia Insurance Co. *v.* Lawrence, 10 Pet. 508, in the United States.

The two first-mentioned cases were in fact before this court in the case of Gazzam *v.* Ohio Insurance Co., above referred to. They did not affect the decision of the case, for it turned upon a known distinction first recognized by this court in Lodwick *v.* Kennedy, and since adhered to, which is this: That where a marine policy contains no insurance against the *barratry* of the master and crew, it does not cover their negligence.

The counsel for the defendant have found no case, English or American, which establishes a contrary doctrine. No case is cited in which the policy does not contain the barratrous clause; and in those which are cited, it will be seen that the liability for mere negligence results impliedly from the undertaking against barratry; and we are left to conclude, that if the undertaking was not assumed by the underwriter he would not be held liable.

In Bush *v.* Royal Exchange Insurance Co., 2 Barn. & Ald. 72, there was a clause against barratry. Bayley, J., reviews the doctrine of insurance of the civil law, and says, "The fair result of all these authorities is this: that the underwriters were liable for a loss by fire occasioned by the negligence of master and mariners, provided they insure against barratry—that term being by the *French* writers used in its larger sense, and comprehending negligence as well as willful misconduct; but inasmuch as the term barratry is used in our policies in a more limited sense, as applying only to the willful misconduct of the master and mariners, the authority of Emerigon affords no ground for our decision in this case. We must, therefore, endeavor to collect the meaning of the contracting parties from the terms of the policy itself, and in considering whether the assured, claiming for a loss by fire, is to have that claim disallowed on the ground that the fire was occasioned by the misconduct of the master, we must look to the other terms of the policy, and determine from them whether the assurers, in other instances, are responsible for the misconduct of

the master; *and when we find that they make themselves answerable for the willful misconduct of the master, in other cases*, it is not too much to say that they meant to indemnify the assured against fire proceeding from the negligence of the master and mariners. I am, *therefore*, of the opinion, in this case, that the assured [21 are entitled to recover," etc.

Here the liability for negligence is deduced exclusively from the liability for barratry; and certainly, where the insurers expressly agree to answer for *willful misconduct*, it is reasonable to infer that they intended to be answerable for mere negligence.

In Walker *v.* Maitland, 5 Barn. & Ald. 171, the same liability for negligence is made to result from the clause against barratry. Abbott, C. J. "No doubt the owner *under this policy* expected to be indemnified against the loss in question. The words of the policy are very large, and although it may appear very extraordinary that the underwriters should undertake to indemnify the assured against the negligence of the master and crew, which is a species of misconduct on their part, yet it is clear that they do so in the case of barratry, which is the highest species of misconduct," etc.

Holroyd, J. "The underwriters engage to be responsible for the barratry of the master, they therefore engage to be responsible for the highest species of misconduct."

In Bishop et al. *v.* Pentland, 7 Barn. & Cress. 219, the policy is not set out. The ship was lost through carelessness of the mate, *by stranding*, which was one of the specified risks. Upon the authority of the two preceding cases the insurer was held liable. We are left to presume of this policy, that it contained the clause against barratry, which is common to the English marine policies.

These are all the English cases, cited by the plaintiff's counsel, that bear upon this question. The only American case relied upon, is the Columbia Insurance Company *v.* Lawrence, 10 Pet. 508.

That was an action upon a land policy against fire, so that the question in this case could not arise.

At page 517, Mr. Justice Story, in considering the point whether negligence of the assured or their servants, would excuse the underwriters, refers, in passing to the same question upon marine policies. He speaks of it as having once been a vexed question, but as settled in England in the case of Busk *v.* Royal Exchange Company, above quoted, and he says that, although the clause against barratry was in the policy, that it was yet "manifest that

22] the opinion of the court proceeded *upon the broad and general ground;" and further, that the case of the Patapsco Company v. Coulter, 3 Pet. 222, adopted the same ground.

With all deference to the learned judge, *that* is not manifest. If we allow the court in Busk v. Royal Exchange Company to speak for themselves, we find that the responsibility for negligence is made to flow from the undertaking against barratry.

The case of the Patapsco Insurance Company v. Coulter, referred to by Mr. Justice Story, came before the court upon error, in the instructions given by the circuit court. There was an insurance against barratry, and the defense was the negligence of the captain. Mr. Justice Johnson, in delivering the opinion of the court, says, "As to the refusal to instruct the jury that their verdict must be for the insurers, if they believe the loss proceeded from the carelessness or negligence of the captain, it is obvious, *since barratry is insured against*, that the court must not be held to have affirmed that fire proceeding from negligence, was a loss within the policy, *independently of the risk of barratry*, but that negligence was no defense where barratry was insured against." Again, at page 234, he says, "It must be remembered that the general question" (that is of liability for negligence) "where there is no insurance against barratry, need not be here considered."

Surely, Mr. Justice Story is mistaken in supposing that in this case the court adopted the *broad and general ground* of liability for negligence, without reference to the barratry clause, when it is evident they more than once, in the opinion, carefully distinguish the case from that of a policy not containing that clause.

At page 233 of the same case, Mr. Justice Johnson, referring to Busk v. Royal Exchange Company, speaks of it as having affirmed the principle, "that where an insurance is against barratry, a loss arising from fire originating in negligence shall be borne by the underwriters." So that his understanding of that case was that the decision, instead of proceeding upon the supposed broad and general ground, was predicated upon the barratry clause.

In the case of Andrews, etc. v. Essex Fire Company, 3 Mason, 26, which came before Judge Story in 1822, he uses this language, "Whether *in any case* the underwriters are liable for a loss by any of the perils of the policy, the remote cause of which is the negli-
23] gence and misconduct of *the master and mariners, not amounting to barratry, is a vexed question, upon which opposite

opinions have been expressed by very distinguished courts. In England the point has recently received, after a solemn discussion, a decision in the affirmative, 2 Barn. & Ald. 72, though it is not difficult to perceive that the former opinions inclined the other way. In New York the point has been unequivocally settled in the negative; and that appears to be the leading opinion also in Massachusetts. The foreign jurists generally concur in exempting the underwriters from losses by the fault of the master, unless that risk is expressly assumed. In this diversity of doctrine I desire to suspend my own judgment until the question is *absolutely necessary to be decided.*" Certainly, upon a question of so much difficulty in the mind of the learned judge, it would be unjust to him, to impute to *a dictum* subsequently thrown out where it was not necessary to decide the question, the authoritative force of a deliberate opinion.

The New York and Massachusetts cases to which the court have been so often referred heretofore, are upon policies containing the clause against barratry. Even with that clause, they excuse the underwriter for liability from negligence. In that they are at variance with the English cases, and it is in reference to the conflict of opinion on that point, that it is said, in the note to the last edition of Kent's Com., vol. 3, p. 304, note *g*, that the weight of authority is against the New York decision.

Inasmuch, however, as the undertaking against the barratry of the master and crew has not been assumed by the defendants in the case at bar, we are not put to a choice between nicely balanced opinions. The defendants have in no shape made themselves responsible for the misconduct, willful or negligent, of the agents and servants of these plaintiffs—there is no such stipulation in their contract. Is it right to put it in by judicial construction? The argument in favor of such construction is this: The perils of the river are insured against. If a boat is run upon an island by the gross negligence of the hands, the current of the river is the *causa proxima*, the negligence of the crew the *causa remota;* and because the proximate and not the remote cause is regarded, the insurers are liable. If that rule is sensible, how does it come that it does not apply in case of *willful* misconduct, without insurance against barratry. If the master purposely run the boat on the *island, it will not be pretended that the insurers are [24 bound; and yet the *causa proxima* is the same as in the case of

negligence. The perils insured against on our western rivers are quite various enough without superadding to them a liability for the want of ordinary care in the master and hands. In sea risks this liability may be taken with some assurance that gross negligence will not occur; for the law of self-preservation will prevent it—but in the navigation of our waters a wreck is rarely attended with the loss of life.

The case of Lodwick et al. *v.* Ohio Insurance Company was decided more than three years before this policy was executed, and had been twice affirmed by this court. The rule so settled had become the law of western insurance, and upon the faith of that rule, with an unhesitating reliance upon its stability, this policy was drawn so as to come within it. If it had been supposed that by any possibility the risk of negligence was to be borne by the company, we may suppose that a much higher premium would have been required.

It is asking very much of a court to change a decision so important in its consequences—so repeatedly affirmed—so generally known and relied upon; and that, too, upon nothing stronger than *the dictum* of a judge whose opinion has hung in doubt upon the very question, and who has once entered a *caveat* against his own judgment upon it, until *constrained* to give it in a proper case.

2. If the court incline against the new trial, there is then a question as to whether the premium of one and one-fourth or two per cent. shall be allowed. The voyage was at and from Duncan's Falls to New Orleans, at the premium of two per cent., with a provision, "if the boat and *cargo should stop, and the interest therein be changed*, at or before reaching Louisville, one and one-fourth per cent. of the premium shall be returned." The stoppage and change of interest here provided for, are obviously very different from *a wreck and loss of property*. A voluntary sale working a cessation of risk without loss to the insurers is clearly intended. To suppose that it was the intention of this clause to provide for *a return* of part of the premium in the event of loss above Louisville, or, in other words, that the insurers should stipulate *to pay a premium* for an early loss, is to force the language used beyond its true meaning, and to impute to this company the want of ordinary discretion.

25] *Judge GRIMKE delivered the opinion of the court:

This was an action of *assumpsit* on a policy of insurance on the

boat and cargo of the plaintiffs from Duncan's Falls, in the Muskingum, to the city of New Orleans. The boat left the Falls, and while pursuing her voyage, was wrecked on Cheadle's Island in the Muskingum river. On the trial a great deal of testimony was exhibited in relation to the condition of the boat, the skill and capability of the captain and crew, and their conduct immediately preceding the disaster. A verdict was found for the plaintiffs, and a motion was made for a new trial, because the testimony showed that although the immediate cause of the loss was a peril of the river, yet that this accident might have been prevented by the exercise of a proper degree of care and diligence on the part of the crew. And thus is presented the question so much discussed of late years, in the English and American courts, whether the proximate or the remote cause of the loss is to be taken into consideration in deciding on the liability of the insurers. The question has already been twice determined by this court, in Lodwick *v.* Ohio Ins. Co., 5 Ohio, 433, and again in Howell *v.* Cincinnati Ins. Co., 7 Ohio, 281, in both which it was held that the remote and not merely the proximate cause of the loss is to be regarded in order to settle the respective rights of the insured and the underwriters. And such I apprehend, was, until very recently, understood to be the law in Great Britain. Thus in Law *v.* Hollingsworth, 7 D. & E. 160, a ship bound to the port of London, which had received a pilot on board, but dropped him before she reached her mooring in the river Thames, after which an accident happened and she was sunk, it was held that for this negligence in not having the pilot on board the insurers were discharged. The exercise of foresight and skill in an emergency where the vessel is endangered, and where it is not the usage to receive a pilot, stands in the place of the pilot; and I do not see but what, if the want of one is sufficient to defeat the right of recovery, that the want of the other should have the same effect also. It is true the mind, fertile in expedients, may make distinction between the two cases, but I can see none broad enough to authorize the application of a different rule to them. Rich *v.* Parker, 7 D. & E. 705, was decided on the same principles as the former case. The vessel was warranted to be American, but the master having neglected to obtain a passport for a part of the voyage, in *conformity with the treaty between France and America, this was held to be a good defense against a loss arising from capture. It [26

is doubtful whether the want of a pilot in the first case, or the want of a passport in the second, were at all instrumental in the loss. It was a mere possibility, especially in the latter case, so that a cause the most remote imaginable, was taken into consideration in deciding on the liability of the underwriters. It is unnecessary to say whether the principles may not have been pushed too far in the last case; suffice it to say, that the English courts have been in the habit of looking beyond the mere peril insured against; it has not been sufficient that a vessel was stranded or captured, where the policy covers a loss of this kind. The whole chain of causation which may have led to the catastrophe, so far as it is traceable by the mind, is considered as of the utmost moment in determining the respective rights of the parties.

The subject has undergone a good deal of investigation in the American courts, and it has generally been held that insurers are not responsible for the negligence or misconduct of the master or mariners, unless they amount to barratry, and unless a clause against barratry is inserted in the policy of insurance. Thus, in Green *v.* Phœnix Ins. Co., 13 Johns. 451, where a vessel was insured among other risks against fire, and during the voyage a seaman carelessy put a lighted candle in the binnacle, which took fire and communicated to some powder, in consequence of which the vessel was blown up and lost, it was held that the insured were not entitled to recover. No case can be more directly in point, for the purpose of establishing the position that the remote, and not merely the proximate cause of the loss, is to be taken into consideration, in ascertaining whether the peril insured against has occurred. So also in Cleaveland *v.* Union Ins. Co., 8 Mass. 308, where the vessel was captured in consequence of the negligence of the master in leaving the ship's register in the Isle of France, it was held that it was not enough that a loss by capture was one of the the risks insured against; that the cause of the capture should be inquired into, and if that was in reality the neglect of the master that the underwriters were not responsible. These cases were discussed, both upon principle and authority, and although a principle may sometimes be prematurely decided, that is, before a sufficient experience of all the inconveniences 27] which it may give rise to, yet this can not be said to *have been the case on these occasions. Indeed, I believe it may be asserted, that until some recent decision in the English courts, the

whole current of British and American authorities were consistent and uniform on this subject. Perhaps the contradiction which is so often to be found in the books on the same question of law, is as much to be ascribed to the mere ingenuity of the human mind, in inventing and fancying new views as to the acquisition of a greater share of wisdom and experience. And hence, it becomes the bounden duty of a judge not to be too easily captivated by late authorities, because they declare a different rule from what had been before established, but to ascertain how far they are founded in fair and legitimate reasoning, and how far they are the result of a love of refinement, which is sometimes apt to seize the mind of the greatest and most practiced inquirer after truth.

The recent English cases are Busk *v.* Royal Ex. Ins. Co., 2 B. & A. 72; Walker *v.* Maitland, 5 B. & A. 171, and Bishop *v.* Pentland, 7 B. & C. 219. The first of these cases it is not only difficult to reconcile with any rule of law previously established, but what is more to be regretted, it is difficult to reconcile it with itself. The loss arose from the negligence of the mate in lighting a fire in the cabin. There was a clause in the policy against barratry; and Bayley, J., after investigating the doctrine on that subject, and showing that although the term barratry is, by the French writers, used in a more large and comprehensive sense than it is in the English law, inasmuch as the former understand it to mean negligence as well as willful misconduct, says: "When we find that the insurers make themselves answerable for the *willful misconduct* of the master, it is not too much to say that they meant to indemnify the assured against fire proceeding from the *negligence* of the master and mariners," which is precisely the reverse of the conclusion to which one would have supposed that his mind should have been brought. For if the word barratry does not comprehend negligence, how can it be argued that a warranty against the former only amounts to a warranty against the latter also. It is not like a genus containing the species. For barratry and mere negligence are not different in degree; they are different in kind. The argument would have been irresistible the other way; if the judge had come to the conclusion that, as the parties had been careful to guard against willful misconduct only, that it was *not* *their intention to protect against negligence; [28 that if the express warranty did not absolutely extinguish all implied warranties which might be supposed to arise out of the

policy; that at any rate it was not allowable to infer the existence of the latter from the existence of the former only. It is not because the general principles of law authorize a recovery against underwriters where negligence is the remote and real cause of the loss, but a secret intention to warrant against it is attempted to be inferred, because the policy of insurance contains a warranty of an entirely different import. At any rate, it must be admitted that the two views are so confounded together that it is impossible to say what would have been the decision of the court if there had been no clause against barratry in the policy.

The case next in order is Walker *v.* Maitland. The loss arose from the vessel having been beaten to pieces by the force of the winds and waves—an accident which would not have happened if the crew had done their duty, but the mate went to sleep, and soon after the whole of the watch on duty went to sleep also. Abbott, C. J., says: "No doubt the owner, under this policy, *expected* to be indemnified against the loss in question." An expectation to be indemnified and a right to be indemnified are, however, very different things, though it is difficult to see how even the former is established, for he goes on to say that "it may appear *extraordinary* that the underwriters should undertake to indemnify the assured against the negligence of the master and crew," and then concludes as in the former case, that they do so because barratry is a protection against willful misconduct; that is, barratry means negligence, and yet negligence is not comprehended within the meaning of barratry.

He proceeds to say that he is afraid of laying down the rule that negligence in the crew will discharge the underwriters; "it will introduce an infinite number of questions as to the quantum of care which, if used, might have prevented the loss." This, then, is one of the difficulties felt by the English courts, and which has occasioned a departure from the earlier cases decided by them. But is this difficulty really greater than occurs in a multitude of other cases, which are continually arising, in which the understanding is tasked, and which, in order to be correctly decided, demands the exercise of a sound judgment and clear discrimina-
29] tion? The whole law of *bailment, which is of such constant application, depends, in all its ramifications, upon the greater or less degree of care or negligence; and yet no one has ever ventured to sweep away its nice and intricate distinctions, merely because

it required much thought in order to apprehend and apply them.

The next case is Bishop *v.* Pentland, 7 B. & C. 219. The ship was lost by stranding, through carelessness of the mate. There does not appear to have been any clause in the policy against barratry. And yet Bayley says, "the two former cases establish as a principle that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the conduct of the masters and mariners." And yet in both the former cases, the greatest reliance is placed upon the insertion of the clause against barratry. It would not, perhaps, be fair to say of these cases that they are carelessly and loosely decided, when one considers that the king's bench have now a docket of five hundred cases to dispose of, instead of, as in the time of Lord Mansfield, one of only forty. But it must be admitted that they are not so convincing and satisfactory as could be desired.

In the Columbia Ins. Co. *v.* Lawrence, 10 Pet. 508, the late determinations of the English courts appear to be approved of. That was an insurance on a house, as to which it has sometimes been said that the law has always been understood to be that the proximate cause of the loss is alone regarded, whatever it may have been as to marine insurances. Whether this is truly the case, it is entirely unnecessary to decide. It is admitted that there is not a single case to be found in the books in which the point has been determined. Mr. Justice Story, in the case last cited, says, "it is manifest that the opinion of the court in Busk *v.* Anderson proceeds upon the broad and general ground" that the proximate, and not the remote cause of the loss is regarded; and yet, such does not seem to be the fact, from the examination which I have given to that case. Indeed, it is more than doubtful, whether any such decision would ever have been made if the clause against barratry had not been inserted. All these remarks, to which I have alluded, in the opinion of the court in 10 Peters, were, however, clearly extrajudicial, as the peculiar wording of the policy was alone deemed sufficient to authorize a recovery against the underwriters.

*It is evident that in marine and river insurances, there is a [30 closer connection between the insured and the crew who man the vessel than there can possibly be between these last and the in-

surers. The crew are in reality the agents of the insured, and are entirely independent of any control from the insurers. It will contribute, therefore, much more to the maintenance of perfect good faith, if the latter are discharged from liability, where the loss of the vessel has been occasioned by the negligence of the mariners. If, because the insured have selected a crew apparently capable, they are, therefore, to be absolved from any further care, the inevitable consequence will be that less care will be used in the selection of the crew. Hands will generally be upon their best behavior at the time they are first employed, and it will be easy to say, in answer to any defense which the underwriters may make, that all the duty which was imposed upon the insured, in the first instance, has been discharged. The unseaworthiness of a vessel is sometimes not tested until she has been at sea many weeks and has encountered a storm. And in the same manner, the unseaworthiness of a crew is frequently not ascertained until some emergency has occurred which demands the exercise of self-possession, prudence, and discretion. In Andrews *v.* Essex Fire Ins. Co., 3 Mason, 26, the same judge, who delivered the opinion in the case in 10 Peters, admits that this is a vexed question upon which opposite opinions have been expressed by very distinguished courts; and he also admits that the former decisions in England are not easily reconcilable with later ones.

In this state of the matter, it would seem to savor too much of vacillation and instability, which should forever be avoided in the determination of important principles of law, if a rule were now to be declared different from that which has hitherto been established to be the law in the courts of Ohio. It is admitted that different courts have taken very different views of this question, and it must also be admitted, therefore, that it is a question about which the most enlightened understandings may be expected to differ. That which is of the greatest importance, is that the law should be definitively settled; parties can then accommodate their conduct and agreements in conformity with it, and in no event can they reasonably complain that they have been deceived. And, on the whole, the conclusion is that insurers are not responsible 31] *for the negligence of the master and crew where this was the remote, though the peril insured against was the immediate cause of the loss.

Another question was made, whether there should be a return

of any part of the premium. The general rule is, that if the risk has once commenced, there shall be no apportionment or return of premium. The stipulation contained in this policy provides for a contingency which has never occurred.

New trial granted.

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PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF CHILLICOTHE *v.* THE MAYOR AND COMMONALTY OF THE TOWN OF CHILLICOTHE.—JOHN WOODBRIDGE, CASHIER OF THE BANK OF CHILLICOTHE *v.* THE MAYOR AND COMMONALTY OF THE TOWN OF CHILLICOTHE.

Where a town corporation is invested with the powers usually conferred upon such bodies, a contract borrowing money for the use of the town is obligatory and binds the corporation for repayment, although no express power to borrow money be given in the law of incorporation.

THESE two cases originated in the court of common pleas of Ross county, from which they were appealed to this court. Although not precisely alike, they both depend upon the same principle.

The actions are debt. The declaration in the first case is upon a written instrument, of which the following is a copy:

"*The State of Ohio, Ross County, Mayor's Office, Chillicothe, ss.*

"I have borrowed of the president, directors, and company of the Bank of Chillicothe five hundred dollars, for the use of the corporation; and in the name of the mayor and commonalty of the town of Chillicothe, do promise to pay the same at their banking house, in six months from the date hereof. In testimony whereof, I, William Steele, mayor of the town of Chillicothe, have hereunto set my hand and affixed the seal of the said corporation, this 19th day of October, in the year of our Lord, one thousand eight hundred and thirty. WILLIAM STEELE."

The second suit is upon three several instruments which are alike in all respects, except as to the time of payment, the same

being payable in two, three, and four years after date. Of one of these instruments, the following is a copy:

32] *"*The State of Ohio, Ross County, Mayor's Office, Town of Chillicothe, ss.*

"Whereas, the mayor and commonalty of the town of Chillicothe, on the 8th instant, pursuant to a vote of the citizens of said town, directed the undersigned to issue certificates or evidence of debt in stock, principal amount two thousand dollars, bearing interest, payable and redeemable at the Bank of Chillicothe, in ten equal installments, the first to be redeemed in the year 1832; the money to be applied toward the improvement of Water street in said town, by a change of the Ohio Canal line as contemplated by the citizens aforesaid.

"Now, therefore, these presents testify that, pursuant to the promises aforesaid, we, the mayor and commonalty of the town of Chillicothe, do hereby promise to pay at the Bank of Chillicothe aforesaid, to John Woodbridge, Esq., cashier thereof, or to his successor in office, within two years from this date, two hundred dollars, with interest thereon, at the rate of six per cent. per annum, payable semi-annually from the date hereof. In testimony whereof, I, William Steele, mayor of the town of Chillicothe, have hereunto set my hand and affixed the seal of the corporation of Chillicothe, this 12th day of July, A. D. 1830.

"WILLIAM STEELE."

All these instruments were under the seal of the corporation.

In each case the defendants having craved oyer, demurred generally.

WM. ALLEN, in support of the demurrer:

The pleadings in these two cases present the same and but one general question, to wit: Have the *mayor and commonalty* of the town of Chillicothe the *power* under the charter to *borrow money?*

It being conceded that the power is not expressly granted. Does it exist by *implication* from other powers which are expressly granted as *incident* to those powers?

I shall assert and attempt to maintain the following propositions:

1. That the delegated power to borrow money is, in its nature, a *high, independent, substantive, sovereign power*, and can, therefore,

in no instance pass from its primitive source but by express grant.

2. That if the power be not in its nature a substantive *power, [33 and if it may be fairly referable to the class of implied powers, yet it could pass by implication only in the case of a government possessing by express grant other high, sovereign powers, to some one of which this power could be drawn by necessary implication; and that a mere municipal corporation has not, nor ever can have, even by *express grant*, such a sovereign power as will draw this after it as an incident.

3. That if the power to borrow money may be taken by implication as incident to other powers expressly granted to a municipal corporation, yet it can not be in the instance of the corporation of Chillicothe, because the amendatory act expressly defeats such implication by removing the necessity for a resort to such a power, and therefore negatives its exercise.

These propositions the counsel proceeded to elucidate and maintain in a very elaborate argument, in which he examined the nature of government generally, and of the government of the United States and of the several states. He insisted that it was only in virtue of power expressly granted that the United States could borrow money. That it was the want of this power and the power to raise money annually, in the confederation, that led to the adoption of the constitution; and to sustain this position, he cited the numbers of the "*Federalist*." He contended that to the state "the power is *expressly* given, because that is among the sovereign powers of legislation, and because *all* legislative power is expressly given in the first article of the constitution, which declares that the *legislative authority* of the state shall be vested in a general assembly."

He also descanted upon the difference between substantive and incidental powers at some length, and examined critically the several acts incorporating the town of Chillicothe. In support of his proposition, he cited 2 Kent's Com. 239, 240; 2 Cranch, 127; 15 Johns. 358; 3 Barn. & Ald. 1; 4 Wheat. 573; 12 Wheat. 64; 5 Ohio, 393. He also referred to several acts of the state legislature expressly granting this power to municipal corporations, as containing a legislative interpretation upon the subject, and came to the conclusion that the corporation had no power to borrow this

money; and, therefore, although they have the use of it, still they were under no obligation to pay it.

SWAN, of counsel for the plaintiffs, insisted that a corporation possessed not only the power expressly granted, but all others 34] *are incidental thereto, which are necessary to carry the powers thus granted into effect. 2 Kent's Com. 239; 4 Wheat. 316; 8 Wheat. 339; 4 Wheat. 636; 15 Johns. 358.

He admitted that the power to borrow money was not expressly granted to the mayor and commonalty of Chillicothe, but insisted it was incidental to, and necessary to carry into effect the powers which were granted. These powers he enumerated. He cited in addition 6 Wheat. 595; 8 Wheat. 350; 10 Johns. 706; 7 Conn. 550.

Upon the hypothesis that the corporation had no power to borrow this money, he insisted that this was no defense to the action. It might be a reason why the charter should be forfeited, but could be none why the debt should not be paid. 16 Mass. 94.

LEONARD, in reply, submitted an argument at length, in which he sustained the propositions of his associate counsel, and with much force attempted to refute the arguments of the opposing counsel.

Judge HITCHCOCK delivered the opinion of the court:

These cases are of great importance, on account of the principles involved, and have been argued by counsel with the ingenuity and ability which the importance of those principles demands. It must be admitted, too, that the cases are of that description where there is danger that a court, from its earnest desire to do justice, may be led astray upon points of law, notwithstanding all its anxiety to the contrary. For it is certain that if the defense be legal, it is manifestly unjust, and such a defense as no court would sustain unless impelled to it by some well-settled and unbending principle of law. The corporation of Chillicothe have borrowed the money, for the recovery of which these suits are brought. In one instance it was done in pursuance of a vote of the people of the town constituting the corporation. This money has been used, as we are bound to believe, for the interest of the town; and non-payment is resisted, upon the ground that this same corporation had not the power to borrow the money, and that in

doing so, they violated their charter. The language of the defendants to the plaintiffs is in substance this: True, you loaned to us this money, you did it at our earnest solicitation, we have used it for our own benefit; but we have no power to borrow, we violated our charter in so doing, and we will take advantage of this *our own wrongful act, to protect ourselves from the pay- [35 ment of that which is your honest due. No rule of decision which will lead to such manifest injustice ought to be adopted without careful examination and much deliberation.

These cases, as now presented, are believed to be of the first impression, as counsel, with all their research, have not been able to produce a decision in point. As between natural persons, it is true that inability to contract constitutes a defense. Hence the pleas of infancy and coverture are sometimes interposed to avoid the payment of a debt which an honest man or woman might be desirous to discharge. And such pleas are formed in law, not so much on account of their abstract justice, as from considerations of general policy. But although corporations have existed for centuries, still we have found no case in which inability to contract has been set up to avoid the payment of their debts. There are, it is true, many cases where the powers of particular corporations have been investigated, and where they have been held to have exercised power not granted to them, in consequence of which their acts were void; but these have been cases where the corporations themselves have been striving to set up or enforce powers, not where they have set up as a defense that they themselves had been guilty of a usurpation of power. Such are cases against individuals charged with trespasses or other misfeasances, and where the defense is, that they acted in pursuance of powers delegated to them by corporations. Such was the case of Colter v. Coty, 5 Ohio, 393, relied upon as an authority for the plaintiff. It was an action for replevin for fifty kegs of gunpowder, and the defendant justified under the plea that he was marshal of the city of Cincinnati, and that he retained the gunpowder under an order of the corporation, because it had been forfeited for a violation of a city ordinance. The court held that the corporation had no power to create a forfeiture, and, therefore, that the defendant was not justified. To have assimilated that case to this, it should have been against the corporation itself, and the corporation should have relied upon the defense that they were exonerated,

because, in the creation of the forfeiture, they had been guilty of usurpation.

As a general principle, no corporation can exercise powers not granted in its act of incorporation. This act is its constitution, 36] and whenever it oversteps the limits therein prescribed, *its act so far becomes void. But where certain powers are specifically granted, these carry with them such others, as incidental thereto, as are necessary to carry those specified into effect. It is proper, too, that these powers should be strictly construed, considering with how little care chartered privileges are in these days granted. 2 Kent's Com., 2 ed. 298, 299; 2 Cranch, 127; 4 Wheat. 636; 4 Pet. U. S. 152. But a different rule of construction ought to prevail where a corporation is endeavoring to extend its power to the injury of others, and where it sets up, by way of defense to an action brought against it, that it has itself been guilty of usurpation of power.

In considering this case, it is not my purpose to enter minutely into the arguments of counsel, although there are some principles advanced for defendants in the opening argument, in which I can not fully concur. In justice to counsel, I will say that this argument evinces much thought and reflection, and as a political production is worthy of great consideration. It seems to me, however, that it might have been better addressed to the mayor and commonalty of Chillicothe, and to the people of that town, to dissuade them from contracting their debts, than to this court, to induce us to lend our aid to the corporation in avoiding their payment.

It is said "that the delegated power to borrow money is in its nature a *high, independent, substantive sovereign power*, and can, therefore, in *no instance* pass from its primitive source but by *express grant.*"

I do not know that I fully comprehend what is intended by this proposition; according to my understanding, it amounts to this: the power to borrow money being a *high, substantive, independent sovereign power*, has its source with the people, who are the primitive source of all power, and must remain there until *expressly* granted. If this be true, it must follow that the corporation of Chillicothe have not power to borrow money, and could not have had, had it been expressly granted in the act of incorporation, and for the reason that the people have not delegated in the constitution this

power to the general assembly—and no one will pretend that this body can confer upon a municipal corporation a power which it does not itself possess. Upon this principle debts contracted by the general assembly, for money borrowed, are not binding *upon the state; I am not prepared to admit this question; [37 it goes at once to destroy all confidence in the public faith.

This is not the doctrine, however, which the counsel intends to advocate. He supposes this power is *expressly* given to the general assembly, because, as he says, it "is among the sovereign powers of legislation," and all legislative power is expressly given, in the first article of the constitution, to the general assembly." That the general assembly have the power to borrow money, I have no doubt, and I agree with counsel that this power is conferred by the grant of all legislative power. The only difference between us is in the nature of the power. He considers it as a substantive, independent, legislative power. I consider it as incidental, general legislative power. It is not of that "high, independent, substantive, sovereign" character contended for. This power, resting in the general assembly, may be granted by that body to a municipal corporation, either expressly, or as it possesses it itself, incidentally or by implication.

That this power is not expressly granted to the corporation of Chillicothe is admitted, and the only question is, whether it is granted by implication. In order to arrive at a correct conclusion, it is necessary to examine the act of incorporation. The original act was passed on December 28, 1813. In section 1 the limits of the town are specified, and the same is erected into a town corporate by the name of Chillicothe. Section 2 provides for the election of officers, and section 3, that the mayor, recorder, treasurer, and common councilmen, elected in pursuance of section 2, and their successors in office, shall be a body corporate by the name of the "*mayor and commonalty of the town of Chillicothe*," with capacity "to purchase, receive, possess, and convey any real or personal estate for the use of said town of Chillicothe; provided the clear annual income shall not exceed four thousand dollars."

In section 5, power is given "to lay a tax within said town," for the purposes, and to be assessed in the manner in the act specified.

In section 6, power is given "to erect and repair public build-

ings for the benefit of said town, and make and publish laws and ordinances in writing, and the same from time to time alter and 38] repeal, as to them shall seem necessary, for the *internal safety and *convenience* of said town of Chillicothe and the inhabitants thereof."

From these extracts it will be seen that this corporation, as by that law constituted, had legislative power; this power, it is true, was restricted to such objects as should seem necessary for the internal safety and convenience of said town of Chillicothe, and restricted, too, so far that the laws made and published, should not be contrary to the laws of the state or of the United States. It had the power further, "to purchase, receive, possess, and convey any real or personal estate for the use of the town, to erect and repair public buildings for the benefit of said town," etc.

If the power to borrow money be, as is insisted by counsel, a *substantial legislative power*, or, according to my apprehension of the subject, an incident to legislative power, and, if it became necessary, for the safety and convenience of the town, or to carry into effect the power granted to purchase real or personal estate, or to erect or repair public buildings, to borrow money, there could be no objection to passing a law or ordinance to that effect. When passed, it would be obligatory on the corporation, and the money procured would constitute a debt which the corporation must discharge. Such law would contravene no principle of the constitution or laws of the state or of the United States, or any principle contained in the charter of incorporation. To effect other subjects than those specified in the charter, money could not, with propriety, be borrowed. But if it should be, that circumstance could hardly be set up as a matter of defense against an action brought for the recovery of the money. It would rather be a question between the individual corporation and their officers, or it might be between the state and the corporation.

This act of December 28, 1813, was amended by an act passed on February 4, 1825. Although, by this amendatory law, all parts of the original law within its purview were repealed, it added to, rather than diminished the power of the corporation. Like the former law, it conferred power on the corporation to lay a tax, which might be increased to any extent by a vote of the freeholders and householders of the town at an annual election. It also conferred upon the mayor and common council the "power to pass

and publish all such laws and ordinances as to them shall appear necessary for regulating the streets, alleys, and highways, and for cleansing, *raising, draining, paving, turnpiking, or otherwise [39 keeping the same in repair," and also, "to pass all such laws and ordinances relative to the good government of the town," etc. If, in affecting any of these objects, it became necessary to borrow money, the corporation might, with propriety, do it. In one of the cases now before the court, the money was borrowed expressly for improving one of the streets.

For the purpose of purchasing real estate, erecting and repairing public buildings, cleansing, raising, paving, draining, turnpiking and otherwise keeping streets in repair, contracts must necessarily be made. Ultimate payment, it is true, must be made from taxation. But until money could be thus raised, it seems to the court that it might be provided otherwise, and in no way better than by borrowing. And really I can not see the great difference whether a corporation shall be indebted to A. for labor in repairing streets or buildings; or to B. for money borrowed to pay A. for this same labor. The moral obligation to pay would be the same in either case.

In the cases now before the court, there is nothing illegal in the consideration, and there is no violation of any positive law or moral principle in the premises. The undertakings are not to do an illegal act, but to refund money actually borrowed. The plaintiff violated no principle of law in loaning the money, and certainly there would be nothing immoral in the defendants' paying it. On the contrary, we think its payment is required by every principle of moral honesty, and prohibited by no arbitrary rule of law.

The demurrers to the declarations will be overruled, and judgment rendered for the plaintiffs.

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LESSEE OF REYNOLDS AND WIFE *v.* ABIGAIL SHIRLEY.

A testator holding a paper in his hands says, this is my will, executed in 1824, I have called you to witness that it is my last will and testament; he then proposes that a certificate of this fact of reacknowledgment be written

on the will, which is so written and acknowledged, and not signed by the testator, but by the attesting witnesses. Held, a good republication, giving effect to the will from that time.

THIS was an action of ejectment, in which a verdict was taken for the plaintiffs, subject to the opinion of the court, upon a motion for a new trial, on an agreed state of facts. It was adjourned for decision from the county of Huron.

It was elaborately prepared and argued upon several points, but was finally decided upon the single point of fact as to the re-
40] execution of a will by Abiathar Shirley, under which the *defendant claimed as devisee, whilst the plaintiffs claimed as heirs at law of the same Abiathar Shirley.

The material facts of the case were these:

Shirley had made and duly executed his last will and testament in 1834. By it he devised to the defendant certain specific real estate, and added this general clause, "*All my other freehold estate whatsoever.*" Shirley died in 1834, and the estate in controversy was obtained after the execution of the will. The proof of re-execution was to this effect.

Shirley was attacked with cholera, on August 23, 1834. A witness testified that he was sent for by Shirley, on the same 23d of August; that he found Shirley sitting on his bed with the will in his hand; Shirley said to the witness, "This is my will; it was signed and witnessed in 1824, and I have called you to witness it is my last will and testament." Arth. Goodin was also present. Shirley said, "he supposed the will would be good enough without any further witness, but it would be well enough for witness and Mr. Goodin to write upon it and put their names to it to show it was his will." Mr. Goodin wrote a certificate in these words: "This is to certify that the within is, as therein declared, my last will and testament, acknowledged before those whose names are hereto subscribed, this 23d day of August, 1834. "Subscribed as witnesses by W. Goodin and G. S. Haskins. The witness, Haskins, states, that this certificate was read to Shirley, who said his name was already to the will, and requested Goodin and witness to sign the certificate, and they did so. The witness testified that Shirley was of sound mind at the time of this transaction. Probate of this will was granted in November, 1834.

F. D. PARISH, for plaintiffs, argued that the republication of a will must be done in writing, executed with all the solemnities required in the execution of the original will. Otherwise, after-acquired lands are not affected. Powell on Devises, 264, alias 443; Roberts on Wills, 476, and onward; 7 Johns. 394; Ib. 312; 3 Chase's Stat. 1786, secs. 2, 5; Stat. of Frauds, 1 Chase's Stat. 693; 29 Ohio L. 218, sec. 4; Dow. 31–40. This is believed to be law in Europe and America, strictly adhered to since the existence of the statute of frauds and prejuries in England.

In the case before us, it is not, or at least it can not with any propriety be claimed, that any new instrument has been thus executed. It is, therefore, difficult to imagine the ground *upon [41 which the acknowledged ability and ingenuity of opposing counsel will succeed in making out a plausible defense. Certainly nothing transpired around the death-bed of the testator, which could, in any point of view, operate to alter, revoke, add to, or diminish from, the old will of 1824. *Vide* act relating to wills, sec. 5. If the old will had, from any cause, become dormant or, void, the most that can, with the least plausibility, be claimed is, that new life and effect was given to the will as it originally operated. No *new* or *different* effect can, upon any known principle, be claimed to have been given to it. If such a will may be revived by parol, or even by a *reacknowledgment* of it, by the testator in the presence of witnesses, who attest his declarations and reacknowledgment of it, it could do no more than to restore the originial effect and operation of the will. The very idea of the republication of a will, implies nothing further. Consequently, as before remarked, it does not in the least alter or change, diminish from or *add* to, the effect of the old will.

But let it be supposed that the certificate drawn on the back of the will on August 23, 1834, had been then signed by the testator. There would have been still remaining several unanswerable objections to its passing the property in dispute.

1. The certificate, in such a case, would have only given effect to the will as it originally stood. The language of the certificate is: "This is to certify that the within is, as is therein described, my last will and testament," etc. That is, it would have been then, his will, that the Bloomingville property, "*together with*" all "the freehold estate" which the testator owned on December 18, 1834, should go to the defendant. No other intention could have

been legitimately deduced from the words of the certificate; and no declarations of the testator, as to his intentions, could be introduced to control the import of the will or certificate, or to give a meaning to the words used in either, which can not be reasonably collected from the words themselves. 8 Mass. 506; 1 Salk. 234. Nor can another paper be considered in giving construction to a will. 1 Salk. 231–234; 14 Johns. 1.

Had the certificate been signed by the testator, this case would have been in some degree similar to the one found in 2 Bos. & Pul. 500. In that case it was decided that a codicil (not a mere certificate), in which the devise of all the testator's freehold in the 42] original will was referred to by the *words, "my *said* lands," etc., could not operate to pass the estate acquired between the respective dates of the will and codicil. ' An *intention* to devise the after-acquired lands can not be so fairly gathered from the words of the certificate in this case, as it could from those used in the codicil in the case referred to. For, in the one case, the bare use of the word "*said*" before "lands," was held to confine the operation of the language of the original will to the lands owned by the testator at the date of the will; and in the other there would have been a mere reference to the words of the will; in effect saying, "my will is still as is expressed in my will of 1824."

To make another digression from the case. If the declarations of the testator could be referred to as evidence of his *intention*, it would not improve the defendant's case; for his words were of the same import. He said, "it was my will in 1824, and *it is my will now*," etc.

Had the certificate been signed, another objection would have been, that it does not appear that the witnesses subscribed their names in the *presence of the testator*. 29 Ohio L. 243, sec. 2; 1 P. Wms. 345.

BOALTT, and WORCESTER, and WILLIAMS, for defendant, argued that the will was duly republished.

The execution of a will, under our statute, as under the statute of frauds and perjuries, embraces the following formalities or solemnities: *signing by the testator, attestation of witnesses, and publication.* The re-execution of the will under our statute (if essential) as under the statute of frauds and perjuries, would require a repetition of the same formalities.

Under the English statute (and so we apprehend under ours, if essential), the *republication* or *re-execution* of a will of lands, *brings the will down to the date of the republication* or *re-execution*, and *applies the language of it to the real estate of the testator, in the same way* that it would have been had it been *originally executed* on the day of the republication or re-execution. Jacob's Law Dict. 438; 6 Com. Dig. 144, Eng. ed.; Roberts on Wills, 477; Powell on Dev. 686; Ram. on Wills, 165. As a concise view of this doctrine, in respect to the effect of a re-execution, and also in respect to what amounts to a re-execution, we will quote from Jacob's Law Dictionary, 438, above cited:

"A will, as to the disposition of land, and in some other circumstances, *takes effect, or is hindered from so doing, ac- [43 cording to its date. It is, therefore, necessary on certain occasions to *renew* it, as it were, or in fact to *make a new will;* and if the testator is exactly of the *same mind* as to the *method* of the disposal of his property, and the circumstances only require that the will should bear date at any particular time, it will be sufficient for him to call in three proper witnesses, and before them *declare the signature to be his handwriting*, and use *the same forms as in the original execution*, and the three witnesses must sign their names to such new will or republication, mentioning the date thereof." We find the same views expressed in almost, if not precisely the same language in Tomlin's Law Dict. 814, 815. And substantially the same in Powell, 686. See also Roberts on Wills, 481, in note.

To apply the foregoing premises to the present case. On the night of August 23, 1834, when the witness, Haskins, entered the room of the testator, he found the testator sitting upon the side of his bed, with a paper in his hand, and the testator immediately addresses him by saying: "I have not called you altogether for medical assistance, but to witness this paper. It is my will." The witness did attest the instrument in pursuance of the request of the testator, and signed his name to it, together with Goodin, the other witness, as a witness, "that it was the last will and testament" of the testator. It would be difficult to conceive of a more unequivocal act of publication than the deposition of Haskins discloses. *Attestation:* Haskins testifies that both he and Goodin attested the will, and at the request of the testator. Goodin was not called at the *trial.* That the calling of Goodin, or more than

one witness in an action of the heir at law against the devisee is unnecessary, see Espinasse, 291, 391. But an exception is taken to the attestation by counsel for plaintiff on the ground that Haskins does not testify that he subscribed the will in the "presence of the testator." It is conceded that the deposition of Haskins does not disclose the fact of his attesting the will in presence of the testator (*in hæc verba*). But we would ask, what is the presumption of law in this and similar cases? Presumptions, as we understand, are drawn from those facts that usually and ordinarily accompany, or are incident to a transaction as shown to us by experience. And does *experience* show us that when the maker of an instrument calls upon a by-stander to attest it as a witness, that 44] the witness retires *to one side, and out of the view of the testator, for the purpose of complying with the request so made? To put the question, we think, is enough. Besides this, the witness testifies explicity, that he was called upon by the testator to witness the will; that he did sign his name to the paper or will; that *that* was *his*, the testator's, "last will and testament." We would ask again, whether Haskins could have so testified unless the law had been complied with in respect to the testator's being present at the time of the subscription, and in respect to the attestation, *omnia vite acta?* No one, we think, can read the deposition of Haskins without being led to the conclusion that the will was attested *in the presence of the testator.* Besides this, if our recollection serves us correctly, and we think it does, and that confidently, the same witness, Haskins, in his examination at the trial in the Supreme Court, testified expressly that it was so attested, and, we believe, it will so appear from the notes taken by the court at that time, to which we would invite their attention. If, however, after all, the court should be of opinion that the *attestation* was not sufficiently proved, we would hope that they would not make a final decision of a case of so much importance, for the want of calling out a fact that clearly and assuredly escaped by inadvertence the attention of the counsel for defendant. And we do, therefore, if our case is deficient in this point, ask the benefit of a new trial; and as authority for which, we refer to Roberts on Wills, 142, in notes. Bond *v.* Seawill, 3 Burrows, 1773. How extremely liberal the English courts have been in respect to requiring the attestation to be made in the presence of the testator, see Roberts on Wills, 163–165; Jacob's Law Dict. 427; Powell on Dev. 90, 91. *Signing*

*of the testator:* The term used in the statute of wills of Ohio, as in the statute of frauds and perjuries, is signed, as distinguished from subscribed. Our statute, as it is more liberal in other respects than the statute of frauds, so it is more liberal in respect to the signing of the testator. The statute of frauds requires the will to be signed in the presence of the witnesses—ours makes an *acknowledgm ent* of the signature to the witnesses sufficient. Ohio Statutes (of 1829), 243, sec. 2. If the will, or even the name of the testator, be written with his own hand, it is immaterial, under the English decisions, in what part of the will the signature appears. It may be at the bottom, top, middle, or margin. 3 Starkie, 1684; 2 Black. *282; Com. Dig. 390; Powell, 61; Lemayne [45 v. Stanley, Roberts on Wills, 138; Peate v. Oagly, on same page. The reason for this liberality of construction in respect to signing, we find concisely but clearly laid down in Powell on Dev. 66, in remarking upon the case of Lemayne v. Stanley.

"If," says he, "the *intention* to devise be certain, and the *requisitions* of the statute be *verbally* complied with, the law will imply an intention of the testator to conform to the statute, and by *coupling* the *fact* and *intention*, will give effect to the instrument."

The above decisions in respect to the signature of the testator coincide with, and confirm the universally admitted principle in respect to wills, that the intention of the testator is to be the guide of the court, and that this rule applies as well to the *execution* of the will as to its construction. When the court have testimony that the testator himself considers his will as complete, they will so consider it, if the *language* of the *statute* be *verbally complied with.* 1 Saund. 279, in note; 3 Starkie, 1683. And parol evidence is admissible to show that the testator did consider his will as complete, and contemplated no further act. 7 Bac. Abr. 328, 329. But when the testator did not consider his will as complete, and contemplated some further act, but was prevented by extreme weakness from performance, it has been held an insufficient execution, and *parol* testimony may be introduced to show its insufficiency. As when the testator had signed three sheets of his will and attempted to sign again but was unable, it was held insufficient. Right v. Price, Powell, 66. In respect to proof of signing by the testator, it has been repeatedly held, that acknowledgment of his signature by the testator to the witnesses is sufficient. 4 Dane, 502, 568; 2 Black. 282; 3 Com. Dig. 390; Powell on Dev. 61. So acknowledgment

of the will before the witnesses is sufficient proof of the testators signature. 1 Chit. Index, 571; 1 Ves. 11, cited, White *v.* Trustees of British Museum, 2 Supplement to Petersdorf, 1069; Ellis *v.* Smith, 3 Cruise, 49. In the case now before us, the testator produced to the witnesses a will signed and executed in 1824, with his signature at the bottom of the will, as it stood there. When he first produced it, he told them it was his will, thus recognizing his signature by 46] acknowledging the will. *He said futher, that it was signed by him in 1824, that it was his will at that time, and he wished to have them attest it, to show that it was his will "*now.*" Immediately afterward a certificate of acknowledgment is written at the bottom, at the request of the testator, for the purpose of showing, as he said, that it was his will at *that* time. He designed, as appears from the beginning, to add no new signature. He before considered his will complete, and he supposed it would operate according to the terms of it, without any new attestation, but to "make assurance doubly sure," he requests the witnesses to reattest it. After the certificate is written by the witness, it is read to the testator. He, the testator, expresses his approbation of the terms of it, and says to the witness, "that will do." He is then asked if he will sign it. He replies, "no, it is not necessary, my name is already to the will." The witnesses then attest it, at the renewed request of the testator, "that it was his last will and testament." And Haskins says that they attested not the certificate and will severally, but both, and that he considered himself as called upon by the testator to witness both, and so considered when they signed. After the will is attested, it is handed to the testator, who hands it to his wife, and tells her to take care of it. Here is the strongest possible evidence that the testator considered his will "*complete,*" and that he *contemplated no further act.* There is the proof of his signature by his acknowledgment of it, specifically to the witnesses, and also by his acknowledgment of the instrument as his will.

But it is contended by the counsel for the plaintiff, that the certificate, written by Goodin before attestation by himself and Haskins, ought to have been signed by the testator, in order to make the will operate upon the controverted lands.

That certificate either is, or is not, a part of the will. If it is no part of the will, it certainly required no signing by the testator. *We think* it was *not a codicil.* All the authorities assert that a

*codicil* is a writing *annexed* to *a will* to *add to*, *alter*, *explain*, or *take something* from it. 4 Dane's Dig. 550; Bailey's Law Dict. 425; 2 Black. 500; Powell on Dev. 23. The writing in question, leaves the will precisely as it was before. It is true that (if a re-execution or republication were necessary) the will now operates upon more property than it would have done before, because there happens to be other property for it to operate upon. But its **sense*, taken [47 as a whole, as an operative instrument, remains exactly as it was before. We again quote in illustration of our views:

"In a republished will, it must be considered, what the words of the will at the time of republication import; their *sense* can not be enlarged, but their *operation* may; if time or *accident* have *increased* the *amount* or *number* of *particulars* comprised within the compass of its expressions." Roberts on Wills, 477. See also notes on same page and page 478. Suppose the certificate had *not* been added, the case would *then* have come within the very letter of the doctrine laid down by Bayley, Tomlin, and other authorities above cited, in respect to the re-execution of wills.

Again, suppose the certificate were an integral part of the will itself. It will be observed that both the will and certificate were written in the *first person*. The will, as it stood before the certificate, is in the handwriting of the testator; the certificate was written by Goodin, at the request of the testator. The signature "Abiathar Shirley," applies to the part that *follows* his name, with the same grammatical propriety that it applies to the part which precedes. In this point of view, it conclusively and most unequivocally comes within all that numerous list of cases in which it has been decided that it was immaterial upon *what part* of the instrument the name of the testator is found. In this case, when the certificate was read to Shirley, he said in approbation of the terms of it, "that will do," and when asked to sign it, he replied, "no, it is unnecessary, my name is already to the will."

But again, suppose what was written at the bottom of the will should be considered strictly a codicil. A will, it is said, may be made at many different times. There may be twenty codicils written in as many different years, and if the last is executed with the proper formalities, it makes but one will. A will, like a deed, is an entirety. Roberts on Wills, 140–142, etc.; Dane's Dig. 556; Powell on Dev. 6824.

Suppose, Shirley had written his will in 1824, without having

any other signature to it than that which appears now on the first line of it, or without having sealed, attested, or published it till August 23, 1834, and that he then brought it before the witnesses, Goodin and Haskins, in that incomplete state, and the facts had then transpired that are attested by Haskins, the writing of the 48] certificate at the request of the *testator, his acknowledgment of his signature, and the attestation of the witnesses, we might then put the question with the utmost confidence of an affirmative answer. Whether these facts would not make out a good original execution of the instrument; and surely the position can not be less strong by reason of having Shirley's name both at the top and foot of the will, and having it twice attested.

In fine, after an examination somewhat extended, in books of good, of doubtful, and of no authority, and after a careful perusal and reperusal of the very learned, elaborate, logical, and even eloquent argument of the counsel for the plaintiff, we are unable to find any reason for not considering this will, in every point of view that can be taken of it, validly and legally re-executed. We would, also, upon this point, refer the court to the argument and opinion of Prof. Greenleaf, of the law school at Cambridge, Mass., filed herewith.

Judge WOOD, after stating the whole case, delivered the opinion of the court:

Upon the evidence, the court are satisfied that there was a complete re-execution of the will, under which the defendant claims, on August 23, 1834. It is not necessary the witnesses should see the testator sign the will; it is sufficient if he acknowledge his signature to the witnesses. The proof of this acknowledgment in the case before us, we hold to be clear and explicit. The will thus republished, speaks as to, and disposes of the real estate owned by the testator in 1834. The title is therefore in the defendant, and there must be a judgment of nonsuit.

JAMES HEY *v.* SCHOOLEY, LONGWORTH ET AL.

A final decree to sell mortgaged premises, is not opened by an appeal from the decree confirming the sale.

Misapprehension of the right of parties at the time of selling mortgaged premises under a decree, where one of the parties is purchaser, may be cause for setting aside the sale.

THIS was a bill brought to foreclose a mortgage, and was adjourned here for decision, from the county of Hamilton.

The case was this: In July, 1835, the rights of the parties were ascertained by a decree in the Hamilton court of common pleas, and the mortgaged premises were ordered to be sold. In September, 1835, they were sold under the decree, and Longworth became the purchaser. At the November term, a return of the sale was made to the common pleas, and *exceptions taken to its confirmation, [49 which were overruled, and the sale confirmed. From this decree, the respondent appealed, and on the appeal, insisted that the whole case was open for revision.

STORER and SPENCER, for Schooley.

HAINES, for Hey.

LANE, J., delivered the opinion of the court:

Objections are taken to the regularity of the first original decree in this case, and we are asked to examine its merits. But we find the practice well settled, both in our own courts and in those of the United States, that the *final decree*, which, upon appeal, presents the whole matter to the action of the appellate court, is the decree by which the rights of the parties are defined and settled. Wright, 729; 3 Cranch, 179. When further decrees become necessary to carry into effect the rights of the parties, and errors occur in their rendition, such errors may be corrected by appeal; but, in such appeals, nothing is before the court except the proceedings subsequent to the decree which settled the merits. The original proceedings will be no further inspected than to enable the court to decide upon the correctness of the last decision. 5 Cranch, 313; 10 Wheat. 442; 1 Ohio, 271. This interpretation

of the right of appeal is intended to apply to suits in chancery, only where such decrees are parts of the original suit. In suits at law, proceedings had after judgment are to be corrected upon *certiorari*, not upon appeal.

It appears that at the time of the sale some misapprehension occurred among the parties to the suit as to the terms upon which the sale was made, and this misapprehension prevented competition in the biddings, in consequence of which one of the parties has lost all means of securing his debt, while another has obtained a bargain in the purchase of the mortgaged premises. No injustice will be done to the purchaser who is a mortgage creditor and a defendant, by a new sale, as in any event his debt is secure. We therefore set aside the sale, and direct that another be made.

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50] *Lessee of Thomas Lloyd *v.* Aranda P. Giddings.

What delivery of a deed is to be taken as effectual, and what a mere escrow depends on the circumstances attending the delivery. A deed delivered as an escrow, can not be set up in ejectment, to show an outstanding title against the lessor of the plaintiff.

In this cause the plaintiff proved title in his lessor, and thereupon the defendant, in order to show an outstanding title, called upon J. D. Webb, Esq., attorney and agent for said Lloyd, for the production of a deed of quitclaim of said land, in his possession, from said Lloyd to Simon Perkins, dated May 21, 1821; which deed was produced by said Webb, and thereupon the defendant offered it in evidence, to which the plaintiff, by his counsel, objected; and thereupon it was shown to the court that heretofore, to wit: On February 27, A. D. 1818, a suit of ejectment was commenced against the said defendant, for the recovery of the same land, by the lessee of Roger W. Ames, in which suit such proceedings were had, that at the September term of this court, A. D. 1820, a judgment was rendered in favor of the then plaintiff, and the said Giddings claiming the benefit of the occupying claimant law, a decision of commissioners appointed by the court was had, assessing the value of the improvements and of the land in a state

of nature, and it was ordered that the said Ames elect whether he would receive the value of said lands or pay for the improvements; and thereupon the said Lloyd, a resident of the State of Connecticut, who in fact was the owner in fee simple of said land, although at the time of said trial the counsel for both parties supposed the interest to be in said Ames, on the said May 21, 1821, inclosed said deed in a letter to said Perkins, that he, the said Perkins, might arrange the business in the best manner he could: adding, "you may let Giddings take it, if he will do no better, at the appraisement." "I must, therefore, request you to do the best for me that you can with Mr. Giddings. I suppose if he can not pay the money he must give up his claim." It was further proved that said letter and deed was received by said Perkins some time in June, A. D. 1821, who, on July 7, A. D. 1821, signed and sealed a deed of quitclaim of the same land to Aranda P. Giddings, and placed both deeds in the hands of said Webb, agent and attorney of said Lloyd, as aforesaid, to be made use of at his discretion. The deposition of Simon Perkins was read, which is as follows: "I find, among my papers, letters from Thomas Lloyd, in one of which he says that he inclosed to me a deed for lot No. 45, in township 8, range 2; his letter bears date May 18, *1821, and I [51 find a deed in the hands of J. D. Webb, Esq., executed by said Lloyd, which conveys to me the land above described; and I have no doubt that the deed above described is the one which I received from said Lloyd in the letter above mentioned, and on which deed I have now written, *Warren, July* 8, 1835. I have no recollection of making a deed of the above-described land to any one; but in the hands of said J. D. Webb, I find a deed executed by me to Aranda P. Gidding, of that same land. My opinion in regard to these deeds is, that I received of Lloyd the deed, as stated within, to enable me to convey the land to said Giddings if he should be found to be entitled to it; and supposing that he was, I made the deed for him, and delivered both to said Webb, to be made use of at his discretion. My opinion in regard to the transaction is, that it was all done for the accommodation of said Lloyd, that I did not buy the land, or at any time consider it as my own. A letter now inclosed, and on which I have indorsed July 8, 1835, I suppose to be the letter in which I received said deed."

It was further proved that both of said deeds were offered by said Webb, as agent of said Lloyd, immediately after their receipt,

to said J. R. Giddings, agent and counsel of said Giddings, who refused to receive them and pay the value of the land; that said deeds have since remained in the sole possession of said Webb, agent as aforesaid, until this day called for on the trial of this cause, and neither of said deeds have ever been recorded.

Under this state of the case the court overruled the plaintiff's objection to said deed, and permitted the same to be read in evidence to the jury, and thereupon a verdict was returned in favor of the defendant. And on this state of facts the counsel for the plaintiffs moves for a new trial, because the court erred in permitting the deed from Lloyd to Perkins to go in evidence, inasmuch as the title was not thereby vested in the latter.

WEBB and HITCHCOCK, for the plaintiffs:

There was no delivery of the deed to Perkins. It was transmitted to him merely as the agent of Lloyd. There was no bargain, no considerations, no intention to convey the interest in the 52] land to Perkins. It was sent to him as a *convenient mode of enabling him to perfect the arrangement with Giddings. But it may be argued that the delivery was intended as an escrow, and that, as it could not be so delivered to the grantee, it inured to him absolutely. But the case is not stronger than that of Fairbanks v. Metcalf, 8 Mass. 230, where there was an actual, formal delivery to the grantee in the first instance, and yet the court, in order that the intentions of the parties should not be disappointed, decided that it was an escrow. Again, Perkins never accepted the deed as vesting title in him, and the case of Jackson on Dev. Ten. Eyc. v. Richards, 6 Cowen, 617, is directly in point.

GIDDINGS and WADE, for the defendant.

GRIMKE, J.:

It is evident that there never has been a delivery of the deed from Perkins to Giddings. Whether the deed from Lloyd to Perkins was ever delivered is the material question. It is very clear what was the real nature of the transaction and the intention of the parties. Lloyd, instead of executing a power of attorney to Perkins, to enable him to convey to Giddings, makes a conveyance direct to the former. This is a mode which is often adopted, neither party regarding themselves in any other light.

than the one as principal and the other as agent in the whole transaction. Are there any principles of law which will compel us to disappoint their intentions? If a power of attorney had been given to Perkins he would have possessed a mere naked authority; but a conveyance is executed, naming him grantee, and the case, therefore, rather resembles a power coupled with an interest, where any one deriving title under the power is considered as holding immediately of the person who created the power. But there is this difficulty in considering these instruments in this light, that the power is not contained in the deed to Perkins, but is attempted to be created by parol, of which, at any rate, a court of law can not take notice. Nothing is better settled than that a deed can not be delivered to the grantee as an escrow. The reason assigned is, that there is a manifest inconsistency between the declaration of a condition and the delivery. But this has not prevented the courts from limiting the extreme rigor of this principle in such a way as to prevent injustice from being done. Thus, in the Earl of Stair *v.* Murray, 2 B. & Cr. 82, when a bond was delivered by the *obligor as his deed, but both [53 before and after the delivery it was agreed that it should continue in the witness' hands until the death of certain individuals; it was held to be a question for the jury whether it was delivered to take effect from the time of delivery, or upon a condition that it was not to operate until the death of those persons. So in Fairbank *v.* Metcalf, 8 Mass. 230, there was also an actual delivery to the grantee, who then placed the deed in the hands of a third person, to be delivered on a certain contingency; in pursuance of an agreement of the parties, it was held that the deed, although formally delivered to the grantee, yet under the circumstances, could only be considered in transitu, and did not operate to convey the land but upon the happening of the event contemplated by the parties. These are both very strong cases, much stronger than the one now before the court; and it will be observed that in both of these the grantee was ultimately intended to take the whole beneficial interest, and was not intended, as in the present instance, to be a mere agent to convey. Rules are necessarily made very broad and general in the early history of jurisprudence; but afterward limitations to them are found to be as indispensable as the rules themselves; and hence the good sense of the maxim, that there is no general rule without its exceptions.

There are many cases in which a grantee is considered as taking no interest under a deed. Thus, where a conveyance is made to A., and a mortgage is immediately executed to the grantor, *or to a third person*, the widow of A. is not after his death entitled to dower, because A. is regarded as a mere "conduit-pipe or instrument" through whom another conveyance was to be made. Now, the evidence shows that the deed was delivered to Perkins for no other purpose than to enable him to make a conveyance to Giddings. To assert that the title was effectually transferred to him, would be to assert that his widow, after his death, would be entitled to dower; and yet this is a proposition which could hardly be maintained with success.

There is still another view of the matter which is equally decisive. The acceptance of a deed is absolutely necessary to vest the grantee with title under it. No man can be compelled to take a conveyance against his consent. Now, Perkins says that he did not buy the land, nor never considered it as his property. 54] He received the deed, then, at the utmost, *as an authority to convey, and his authority is exhausted in an ineffectual effort to accomplish this object.

The law, with regard to the delivery and acceptance of deeds, was once very plain, because it was very strict. But I take it to be now settled that what shall amount to either, depends very much on the circumstances and the intentions of the parties. Thus, in Clavering *v.* Clavering, 2 New R. 473, a voluntary deed of settlement in trust, made in 1684, always kept by the grantor in his custody, and found after his death among his papers, was held to control a subsequent settlement in 1690, and the same decision was made in Boughton *v.* Boughton, 1 Atk. 625. On the other hand, it has been equally settled that mere formal words of delivery will not, in all cases, be sufficient to render the deed absolute. This was so decided in the cases of Jack *v.* Dun, 1 Johns. Cas. 114, and the Darby Canal Co. *v.* Wilmot, 9 East, 360.

It is evident that if it is possible to lay hold of any principle of law, or of any adjudged case of authority to prevent this deed from operating to defeat the title of the plaintiff, that we ought to do so. And I believe enough has been said to authorize us to come to the conclusion that the deed to Simon Perkins was not, under the circumstances, effectual to convey the title to him, *that*

*it could not be used for the purpose of showing an outstanding title in a third person*, and that accordingly there must be a new trial.

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ANDREW HUSTON *v.* DUNCAN MCARTHUR.

Where a chain of entries of land in the Virginia military district are made dependent upon each other, each calling for a line of a specified distance, and the next commencing at the termination of that distance, the actual location of each must be ascertained by measuring the number of poles called for in the entry. An extension of these distances is not allowable upon an alleged custom of extending at a distance of five per cent.

THE bill states that on March 26, 1792, Smith Sneed made an entry in the Virginia military district, No. 2,067, of one thousand acres, on part of warrant No. 1,159, on the waters of the Scioto, beginning at the lower back corner of David Watkins' entry, No. 1,298, running up with his back line the whole length, thence at right angles westerly for quantity. That said entry was certain in its calls, and appropriated three hundred and forty acres of land, the residue interfering with prior entries being withdrawn. That the said three hundred and forty acres were, on June 19, 1819, duly surveyed, and the plat of survey was duly recorded on July 22, 1819.

That shortly after the record of said survey, said Smith *Sneed died testator, having devised said entry and survey [55 to Charles Sneed. That shortly after, said Charles Sneed also died testator, having devised said entry and survey to Sarah J. Sneed; and on September 28, 1830, a patent issued to the said Sarah J. Sneed, for said entry and survey, devisee as aforesaid. That said Sarah J. Sneed has also died, leaving her last will duly proved, and devised said entry and survey to her sisters, Maria H. Buchnar and Elizabeth T. Neall. Said last will has also been admitted to record by the court of common pleas of Pickaway county.

That said Maria H. Buchnar and her husband Elias E. Buchnar, and the said Elizabeth T. Neall, by her attorney, in fact, Elias E. Buchnar, on June 1, 1833, by deed, duly executed and recorded,

conveyed all their title in said three hundred and forty acres, in consideration of one thousand one hundred and thirty-three dollars, to the complainant. That neither the said Smith Sneed nor those claiming under him were ever within the State of Ohio during the periods of their respective titles.

That the defendant having obtained a patent prior in date to the complainant's patent and survey, made June 9, 1808, and recorded October 13, 1808, purporting to be on an entry No. 5,765, in the name of John McDonald, covering the land previously appropriated under the entry No. 2,067, in the name of Smith Sneed, refuses either to surrender the possession or release the legal title to the complainant for said three hundred and forty acres, or to withdraw so much of the land embraced within his said patent as interferes with the said entry and survey.

Prayer that the defendant quit claim to complainant the said three hundred and forty acres, or withdraw so much of his entry, and to yield up possession and account for the rents and profits, and for general relief.

The bill was filed July 7, 1834.

The original answer (filed August 15, 1835) admits the entry in the name of Smith Sneed, but requires proof by a correct copy. Does not admit that the entry was certain in its calls, or that it appropriated the three hundred and forty acres in defendant's possession, or that the residue of said entry was withdrawn prior to the record of said survey of three hundred and forty acres, but requires proof of these matters. Denies that the survey of the three hundred and forty acres was in conformity with the entry, or that said survey or the surveys of the entries in which it depends, are any evidence that the land included in said surveys, or 56] either of them, is the land appropriated *by the said entries. Insists that an accurate resurvey of each of the entries on which said Sneed's entry depends (if the validity of these entries can be established), and of said Sneed's entry, must be made to ascertain the land appropriated by Sneed's entry. It will be found that no part of the three hundred and forty acres in controversy was appropriated by Sneed's entry.

Defendant admits that he was and is in possession of one thousand acres of land, which was entered and surveyed in the name of John McDonald, and patented to defendant, as assignee of McDonald, prior to the date of said survey and patent on Sneed's

entry, but denies that his claim interferes with Sneed's entry. Denies all right of complainant to the possession of said three hundred and forty acres, or to have the legal title, etc.

Amended answer (filed November 4, 1835). Defendant can not admit that the survey made on Sneed's entry was made or recorded during the life of the said Smith Sneed. States that a patent issued to him for the one thousand acre survey on McDonald's said entry, which patent bears date July 25, 1812. That the defendant was in possession of said survey at the time the patent was issued, and that either himself or those under whom he claims, were in possession long anterior thereto, and as early as the making of said survey in the name of McDonald, and that such possession has been quiet, peaceable, and continued up to this time. Insists that complainant is barred by lapse of time and statutes of limitation.

Publication filed October 31, 1835.

Testimony was taken, but is not here recapitulated, as the same is referred to so far as necessary for the proper understanding of the case, in the opinion of the court.

T. Scott & Son, and Henry Stanbery, for complainant, made the following points:

1. The evidence shows that complainant is entitled to the land covered by Smith Sneed's entry.

2. Sneed's entry is valid, and appropriates the land within its calls.

3. The survey substantially conforms to the calls of the entry. The entry is the twelfth link in the chain of entries made on the Scioto river in 1787. This chain of entries, with the exception of Sneed's, was surveyed in 1793, by Arthur Fox. If Fox surveyed this chain of entries correctly, then *the entry of Sneed was [57 properly surveyed, and appropriated the land now in controversy. It was customary for the early surveyors, in running lines, to make an additional allowance of five per cent. to the length of lines called for. This was well understood by all the surveyors in the military district, and followed by Fox in making these surveys. This custom ought to be sanctioned by the court, otherwise the claims of many to lands in the district will be destroyed, and titles to the land be unsettled. If it is an error, yet, where "it is established and has taken root, upon which any rule of

property depends, it ought to be adhered to by the judges until the legislature think proper to alter it, lest the bare determination should have retrospect, and shake many questions already settled." 1 Bl. 264; 2 Bl. 696; 11 Wms. 223, 399.

SWAN and LEONARD, for defendant, insisted:

1. That the true method of locating entries is by accurate measurement, and that no law or custom adverse to this has ever prevailed in the district, and under this head numerous subordinate questions were fully treated in the argument.

2. The plaintiff's claim is barred by the statute of limitations. 10 Wheat. 152; 3 Ohio, 490.

3. Plaintiff's claim is barred by lapse of time. The claim is stale, and plaintiff guilty of great laches. 7 Wheat. 60; 9 Pet. 416.

4. The death of Smith Sneed, before the survey made in his name, avoids the survey. 4 Pet. 345.

SCOTT and STANBERY, in reply:

The patent, under which complainant claims, did not issue until September 28, 1830; and it has been held that the statute does not begin to run against the owner of an entry and survey until the patent emanates. 6 Ohio, 252. As to the lapse of time, none short of that which would operate as a bar in analogy to the statute of limitations, can affect the right of the complainant. The doctrine of stale equities and laches does not apply in a case like the present. The complainant is not seeking to enforce an ancient contract, etc.

No case is cited to show that a survey may not be executed in the name of a dead man, where the entry was made in his lifetime. 58] Such has been the uniform practice, and its propriety *at this late period ought not to be questioned. But even admitting the survey to be void, the entry remains good, and upon that alone the complainant would be entitled to recovery.

Judge HITCHCOCK delivered the opinion of the court:

This case is one of considerable importance, and has been very fully and ably argued by the distinguished counsel of the respective parties. Its decision, however, depends, as I apprehend, upon one single point rather than upon multifarious and intricate ques-

tions of law; and that is, as to the manner in which Sneed's entry should be surveyed. If it has been properly surveyed, it unquestionably appropriated the land in controversy. The evidence is sufficient to show that the complainant has now all the legal interest that was ever vested in Sneed and his devisees. Of course, as the entry of Sneed was prior in point of time to that of McDonald, under whom the defendant claims, it would seem that the land, of right, belonged to complainant.

The entry of Sneed calls to begin at the lower back corner of David Walker's entry, No. 1,298. Walker's entry is one of a series of entries, as appears by the proof in the case made on August 2, 1787. The first of this series is that of Benjamin Lawson, No. 439.

Lawson calls to begin on the bank of the Scioto river, eight miles above the mouth of Paint creed, on a straight line, thence running up the river for his base line five hundred poles, when reduced to a straight line, thence at right angles with the general course of the river for quantity.

After this, follows the entries of Archibald Blair, No. 440; of Robert Rose, No. 441; of Patrick Carns, No. 442; of William White, No. 455; of Whitehead Coleman, No. 446; of John Jordan, No. 449; of James Galt, No. 451; of Clement Biddle, No. 452; of John Turch, No. ——. Each one of these entries calls to begin at the upper corner of the river of the one next preceding, and to run up the river a certain specified distance, when reduced to a straight line for its base.

Next after the entry of Turch is that of Walker. I was mistaken in saying this entry was made on the 2d; it was not made until August 16, 1787. It calls to begin at the corner of Turch's, on the river bank, running up the river four hundred poles when reduced to a straight line, thence at right angles, *and with [59 the general course of the river and with Turch's line for quantity. This series of entries was surveyed by Arthur Fox, a deputy surveyor, in 1793, and if they were surveyed according to their respective calls, then the land in controversy belongs to the complainant, as the survey upon which his patent is based, actually begins at the lower back corner of Walker's survey, as surveyed by Fox, and covers a part of the land included in the patent of the defendant.

It must be remembered that Sneed calls to begin at the lower

back corner of Walker's *entry*, and not of his *survey*. And the fact that there has been a survey of Walker's entry can, in no shape, affect Sneed and those claiming under him, unless that survey was properly made. It can not affect Sneed, because his entry was made, and the land covered by it, appropriated before Walker's survey was executed; and the execution of that survey can not change the location of land previously appropriated. On the part of the defendant, it is objected to all these surveys made by Fox in 1793, that they were not made according to the entries. They claim that Fox, in surveying the entry of Lawson, commenced at a point more than eight miles above the mouth of Paint creek, and that in surveying the subsequent and dependent entries, he extended the lines beyond the respective distance called for; whereas they insist that an entry should be surveyed by strict measurement. It seems to be admitted, and if not admitted, the fact is established by the proof, that if these several entries had been surveyed by strict measurement, the land covered by the complainant's patent, would be entirely off the ground appropriated by Sneed's entry. The only point, then, raised in this case which it is necessary to decide is, whether, in surveying an entry, the surveyor is bound to do it strictly according to the calls of that entry.

Although it seems to be admitted that the most obvious conclusion would be that entries should be thus surveyed, yet it is strenuously argued by plaintiff's counsel, that a different practice has prevailed in the military district, from the commencement of making locations in that district, and that to interfere at this late period with this practice would be fraught with much evil. It is insisted that it has ever been the custom in making surveys, to extend the lines five per cent. beyond the length called for, and that this custom has been so long, and so uniformly persevered in, 60] as to become, in fact, a part of *the law by which titles and claims to land within the district must be regulated. And it is said that by accepting this mode of surveying, the lands covered by the complainant's patent, will be found to be the same appropriated by Sneed's entry.

That the locators in the district have been in the constant habit of appropriating by entry and survey more lands than their warrants called for, thereby defrauding other locators of their rights, and the government of its domain, there can be no doubt; and it is equally true that the courts have, from necessity, been compelled,

in some instances, to wink at those irregularities. But I am not aware that they have gone so far as to sustain a survey made entirely off the ground appropriated by the entry; especially where such survey encroached upon land already patented to another individual.

It may not however, be improper to inquire as to this custom. A custom, to obtain the force of law, must be reasonable, must be certain, must be continued, and must have commenced time immemorial, or time whereof the memory of men runneth not to the contrary. 2 Bar. Ch. 232.

1. Is this pretended custom reasonable? If it be reasonable, that a man to whom the government makes a devotion of one thousand acres of land, and suffers him to locate it himself, should, instead of the one thousand acres, appropriate to himself twelve or fifteen hundred acres, then this pretended custom is reasonable. But if by such conduct he commits a fraud upon the government, and upon other individuals in the same situation with himself, it is unreasonable and ought not to be sustained. 2. Is it certain? It is certain that almost every locator has appropriated to himself more land than his warrants would entitle him to; but the question is, whether there has been any certain and uniform rule by which this class of persons have been governed in this respect, and whether that rule is the one insisted upon by the plaintiff's counsel. To prove this custom, witnesses are examined, and a letter of the defendant, written at an early period, introduced in evidence. In this letter, the defendant, in speaking of this chain of surveys, commencing eight miles from the mouth of Paint creek, says: "It was customary for the earlier surveyors to make an allowance of five per cent. in the length of line."

John A. Fulton says: "It was customary for surveyors in the district, in surveying rough, broken, and bushy land, to add four inches to the length of the chain, and some did, and some did *not add to the length of the line measured with a chain thus [61 elongated. That in resurveying some of the old surveys, he has found the lines generally to be longer than called for, some exceeding this length five per cent., some more and some less. He states further, that some few of the old surveys would fall short of the distance called for. That there is a great variety of measurement in the old surveys, but generally they measure the distance called for. That he '*does not know of any general standard or proportion of*

*excess.*'" Cadwallader Wallace, another witness called by the complainant, confirms the statement of Fulton. These are the only witnesses examined upon this point. And this testimony, so far from proving any known and certain custom, proves the reverse.

Inasmuch, then, as this pretended custom is neither reasonable nor certain it can not be enforced, and it is unnecessary to inquire as to its commencement or continuance.

Had a custom like the one now contended for ever been recognized in any court, the counsel for the complainant would have produced the case in which it had been so recognized. No such case, however, is produced. On the contrary, I have ever understood the law to be well settled that an entry must be surveyed according to its calls. And in resurveying old surveys, where the lines can not be traced, if but one corner can be found, the resurvey must be made from that corner, according to the courses and distances called for in the original survey, extending the lines no further than strict measure. True, if there are natural or artificial objects called for, these shall control course and distance, but in the absence of such objects, course and distance must govern. This court can not so far pervert the language of Benjamin Lawson as to say, when he called to begin on the Scioto, at a point eight miles in a direct line above the mouth of Paint creek, he intended to begin eight miles and one hundred and twenty-eight rods above the mouth of Paint creek. And that when he called to run up the river five hundred poles, he intended five hundred and twenty-five poles.

It has been urged upon the court that inasmuch as Fox, a regular deputy, surveyed the chain of entries upon the Scioto, upon which Sneed's entry depends, as early as 1793, it is to be presumed that he surveyed them correctly and according to the practice then prevalent. It is clear, from an examination of the plat 62] before the court, that Fox could not have strictly *regarded the entries. Some of the base lines are longer and some shorter than called for. To have recourse to his surveys, therefore, in ascertaining the beginning corner of Sneed, would be improper.

In order to ascertain this beginning corner the same course must be now pursued as must have been had the entries, upon which his is dependent, never been surveyed. That course is plain; commencing at the mouth of Paint creek, and running up the Scioto river, eight miles strict measure, we have the beginning corner.

of Lawson. Running up the river from this point five hundred poles, we have his upper corner on the river, and this is the beginning corner of Blair. Pursuing the same course, we shall find the beginning and upper corner on the river of each of the intermediate entries, until we come to Walker's. And by running his lines, according to the calls of his entry, we find a beginning corner for Sneed; his beginning corner being the lower back corner of Walker. It is admitted that if this course is pursued, Sneed's entry is entirely without the bounds of the defendant's patent, and, of course, the complainant fails in his suit.

Such being the opinion of the court, it is unnecessary to consider the other points made in the case.

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## Wm. B. Johnson *v.* D. W. & W. S. Wallace.

Courts of law can not appoint a person to adjust long and disputed items of account, in an action of *assumpsit*, without the consent of both parties.

This cause was reserved, in the county of Miami, for the purpose of settling a question of practice.

The action was assumpsit, upon a long-running account between the parties. The plaintiff's bill of particulars contained one hundred and seventy-five distinct items; the defendants' bill contained upward of two hundred items. The defendants moved the court to make an order referring the accounts to an accountant to examine, to hear evidence, to state the accounts, strike a balance, and report the result to the next term of the court, reserving all questions of law. The plaintiff's counsel opposed the motion, and whether the Supreme Court could legally make the reference was the point reserved for decision.

No argument of counsel was submitted by either party.

*Judge Wood delivered the opinion of the court: [63

It is admitted by all that a discretionary power vested in the court to settle controversies of this nature in the manner proposed by this motion, would very greatly add to the probability of doing

substantial justice between the parties. In the hurried terms of the Supreme Court on the circuit, it is extremely difficult, consistent with other business, to devote the time necessary to a single case of this character, which certain and impartial justice would seem to require; and besides, the jury is frequently composed of men not familiar with the investigation of accounts, and they are not, therefore, although desirous of doing so, calculated to arrive at correct results; they must, at all events, be slow in their deliberations, and not unfrequently to the great inconvenience of the court. This power of reference has been sometimes exercised, but it has been by consent of parties. In the absence of this consent, we are satisfied we have not the authority, for the constitution of Ohio, and the laws in pursuance thereof, give to either party the right to submit his cause to a jury for trial, and to grant this motion would be to deprive the plaintiff of that right.

The difficulties arising in cases of this kind, however, may be avoided by a resort to a court of equity, which has concurrent jurisdiction with the courts of law in cases of this description. Those long and perplexing accounts might then be referred to a competent master, and be far more satisfactorily adjusted.

Motion refused at defendants' costs, and case remanded.

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## P. Young v. M. Hargrave's Administrator.

In a lease for life, containing no express covenant for quiet possession, no word but *dedi*, *I give*, can be held to imply such warranty.

This cause was adjourned from the county of Hamilton.

It was a suit on a covenant for quiet enjoyment in a lease, made by Hargrave and his wife, of the wife's dower estate, in which Hargrave covenanted for quiet enjoyment. The declaration set forth the lease and averred an eviction in the usual form. The defendant demurred generally.

STRAIT submitted an argument in support of the demurrer, but as his positions are principally embodied in the opinion of the court, it is omitted.

*N. WRIGHT and FOX, for plaintiff: [64

On the part of the plaintiff it is contended that, under the act of 1805, this lease is a valid and binding lease as between the parties, although not acknowledged, and without two witnesses. It has uniformly been decided under that act that a lease did not require subscribing witnesses. 3 Ohio, 465.

It has also been held, that the acknowledgment did not form a necessary part even of a deed; that without such acknowledgment the deed itself was perfect.

There can be no doubt, we suppose, of the instrument in question being technically a lease; it is a grant of the possession for a term, reserving an annual rent. Whether the term is for a fixed time, or depends upon the life of a person, we apprehend can make no difference.

The next question, and the only important question, as we suppose, is whether there are any words used in this lease creating a covenant of quiet enjoyment. We suppose it clear that the words "have rented," amount to a covenant that the lessee shall peaceably and quietly hold the premises during the term specified in the lease. The first case we shall cite to the court is the case of Dugan *v.* Petherbridge, decided by the Supreme Court in this county, in the year 1828. 9 Record Book, 558.

The case was brought up by writ of error from the common pleas, and the error insisted upon was, that there were no words contained in the lease importing a covenant in law. The words relied upon, as amounting to a covenant, were these, "doth rent and lease."

The court held that those words did, in law, create a covenant for quiet enjoyment, and accordingly confirmed the judgment of the court below.

It will not be questioned, we suppose, that the word demise, in a lease, contains an implied covenant that the lessee shall enjoy the land. "When a demise is made by these words, *dedi*, *concessi*, *demisi*, or *assignavi*, the law supposes that the lessor has title to the land he demises, and consequently power to lease, and, therefore, it immediately implies an undertaking on his part that the

lessee shall quietly enjoy the land, if the lease be for life, against all men." Com. Land. and Ten. 172, new ed. 97.

Although the words *dedi*, *grant*, etc., contain an implied cove-
65] nant, *other words of the same import will also carry with them a covenant. No particular form of words is necessary to create a covenant. 1 Bing. 433; 8 Com. Law, 371; 4 Taunt. 329.

The word demise means to let, to farm. It is said by Ainsworth to be from *loco*, which is defined to mean, to place, to let, to lay, to let or set, or *hire for rent*, to let a lease or farm out, to bargain to have a thing done, to put or let out a thing by the great. If these are correct definitions of the word demise, then the words in this lease, "have rented," contain an implied covenant.

But the case does not depend on general reasoning. The question has been decided as above stated, and in 2 Marsh. 302, the court decided that the words "*have rented*," do constitute a covenant for quiet enjoyment.

The books say there is a covenant of quiet enjoyment implied by the law, "upon the words *dedi*, *concessi*, *demisi*, or *assignavi*; for when a demise is made by these words, the law supposes that the lessor has title to the land he demises, and consequently power to lease, and therefore it immediately implies an undertaking on his part that the lessee shall quietly enjoy the land, *if the lease be for life*, *against all men*; if only for years, against all persons having title either paramount to or through the lessor." Com. Land. and Ten. 172; 7 Law Lib. 97.

Either of these words is sufficient to constitute a covenant, and so far from their having less effect in a lease for life, they have a greater effect in a lease for life than in one for years.

It is further said, that in a case of a *lease for life* rendering rent, that an express warranty will not "take away or qualify the implied warranty, but that the lessee may resort to either at his pleasure." Com. 172; 7 Law Lib. 98.

Whereas, in a lease for years, an express warranty is a release of all implied warranties.

It is contended that the covenant in this case is not binding upon the estate of the covenantor; that a covenant on the part of a man who grants a lease for life, dies with the covenantor. Such is not understood to be the law by the plaintiff's counsel. We are willing to admit that on a feoffment in fee, since the pass-

ing of the statute of *quia emptores*, the word *dedi* only implies a warranty on the feoffor, and does not descend on the heir. Yet it must be kept in mind that this is *the effect of a statute reg- [66
ulation, not a common law principle, for it is expressly laid down by 2 Blackstone, 300, that by the ancient law a warranty was annexed to the word *dedi*, which descended and was binding on the heir.

It appears that distinctions have been made between tenants holding of the donor, and his heirs, by certain services, and those holding of the chief lords of the fee. In the former, the donor and his heirs were always bound to warrant; in the latter case he was only bound for life. The *statute de bigamies*, 4 ed. 1, confined the warranty created by the word *dedi* to the life of the feoffor, *unless the lands were given to be held by him and his heirs*, after this the statute *quia emptores* is passed and forbids such reservation of tenure, by ordaining that the feoffee shall hold of the chief lord. Thence it became established that where the fee is conveyed, the heirs of the feoffor could not, in any case, be bound to warrant by force of the word give.

Note to 2 Coke Lit. by Thos. 252, original paging 297 of ed. 1827; Co. Lit. 384, in Thomas ed. 296; 2 Black. 300. And it is expressly laid down by 2 Black. 300, that even at this day upon a gift in tail, or *lease for life*, rendering rent, the donor, or lessor, and his heirs (to whom the rent is payable), *are bound to warrant the title.*

Shepherd's Touchstone, page 160, admits that some authorities contend that the executors are liable on an implied warranty after the death of the lessor.

It will be found that all the elementary writers refer to the case in Dyer, 257 *a*, for the authority to sustain the position, that an implied covenant in a lease for life, determines with the life of the covenantor. If the court examine the case in Dyer, they will not be able to ascertain whether the lease, in that case, did not show that the lessor had only a life estate. If such was the fact, the covenant might well determine with the lease, on the principle that when the term ceases the covenant ceases, and this is the only reason given in the books for the position we are now discussing. The books say the executor is not liable after the determination of the estate. And this is a reasonable doctrine, where the title deeds of the lessee show the fact of the lessors only

having a life estate. But where the lessor says nothing about his own title, but undertakes to grant for a particular term, there we insist the spirit and reason of the law, in implying covenants at 67] all, can not be fully and *fairly carried out, without implying the covenant to the whole extent of the *term* granted.

When it appears on the face of the lease that the lessor has only a life estate, and he leases for a number of years, the lessee must see at once that the lease must determine with the life of the lessor, and as all covenants cease with the estate, no fraud is sanctioned by limiting the covenant to the duration of the estate. But where the lease gives no notice of any limit to his own estate, what can be reasonably and plainly understood by the lessee, but that the man who makes a lease, for a particular time, has a title to the estate for that period? Indeed, this is the morality of the law in making any implied covenant at all. It is to prevent fraudulently disposed men from reaping any advantage from their intended frauds, by holding them to make good their representations.

It will be found, on examining the authorities, that in all cases the covenant continues as long as the term created by the lease continues. The only case which can possibly form an exception to this rule is where the *lease itself shows* that the lessor has an estate which may determine before the lease expires.

There can be no doubt that in cases of leases by tenants for life, where there is an express covenant for quiet enjoyment, that that covenant extends beyond the life of the lessor.

It was so decided in Evans *v.* Geogurst et al., 10 Eng. Com. Law, 327; 4 Barn. & Cress. 261, where lessee for life leased for eighteen years, and died before the expiration of the lease, it was held his representatives were liable, on a covenant of quiet enjoyment, "for and during the said term," so long as the term mentioned in said lease continued, and that the word *term* meant the period mentioned in the lease.

We have stated that we consider the lease in question a formal lease to pass the estate, under the law then in force; but we are not to be understood as regarding the affirmative of that position necessary to sustain our action. The covenant is equally binding, whether the lease be formally executed or not. To make the covenant available as an estoppel in ejectment, it must be maintained in a deed which passes the estate; but not so where the

mere personal liability on the covenant comes in question. This distinction is stated by this court in 5 Ohio, 192, in referring to the case of the Dean of Norwich, 2 Brownlow, 165. That was a case of a lease for *lives, 6 Cowen, 128, and shows that the [68 covenants are equally available in such case as a personal covenant, though no estate pass. The confusion in these cases has arisen from overlooking the distinction between the technical operation of certain real covenants at common law and the common effect now given to them as personal covenants. A technical common law warranty operated on the title and run with it; an executor originally could not even be sued on it. 6 Cowen, 123; 8 Cowen, 36; 4 Kent's Com. In other respects its effect was peculiar. To have the technical effects of such a warrant, the covenant must be found in a deed passing the interest, and so say the books, but they do not refer to the effect of the warranty as a *personal* covenant.

It would seem that the idea that the implied covenant in a lease must cease with the estate, may have arisen from the same confusion of ideas. The old books refer to it as a doubtful or disputed position. The case in Dyer, 257, is ancient; we can find reasons for that decision in many of the old and obsolete doctrines of real warranties, but we can find none at all for it under the modern doctrines applicable to personal covenants. The decision might have arisen out of the ancient doctrine of real warranties, considered as running only with the estate, and of course dying with it, but could not be sustained on any principle applicable to the modern use of these warranties as personal covenants.

Judge LANE delivered the opinion of the court:

On April 26, 1826, Maxwell Hargrave, and Ann, his wife, made the indenture with Young, by which it is "witnessed that they, for the consideration of the yearly rent of one hundred and fifty dollars and sixty cents, to be paid quarterly, have rented unto said Young the premises, etc., for and during the life of said Ann." After the death of Maxwell Hargrave, Ann Hargrave made a sale of the same property, and the purchaser from her brought an ejectment against Young, upon which he was evicted. 6 Ohio, 313. This suit is brought upon the claim that the terms of the lease constitute a covenant by Maxwell Hargrave for quiet enjoyment during the life of Ann Hargrave.

The doctrine of implied warranty of real estate belongs to the ancient law. Although its application to leases for years has de-
69] scended to our day, its relation to higher estates have *been nearly suspended by the adoption of express covenants in deeds. It is now little understood and nearly obsolete.

The ancient creation of estates consisted in the donation of land to the tenant, to be held of the donor, and reciprocal relations arose between them. From the tenant was due homage and the feudal services; in return, the donor was bound to assure the enjoyment of the estate, which he undertook to confer. These duties were held to arise, not from express obligation, but from the nature of the tenure. They were imposed upon the tenant by his acceptance of the estate, and they might be exacted of the lord, who employed the term "*dedi*," or other term of donation by which estates were created. Hence Lord Coke says, "Where *dedi* is accompanied with a perdurable tenure of the feoffor and his heirs, there *dedi* importeth a perdurable warranty, for the feoffor and his heirs to the feoffee and his heirs. 2 In. 275. When the statute *quia emptores* in destroying the practice of subinfeudation, cut off the tenure between the feoffor and the feoffee and his heirs, the co-relative obligation of warranty could not be raised against the heir of the feoffor. Still the feoffor was supposed to be bound by his own gift, and the warranty personally binding upon him for life. From hence follows the principle, which is sound law, at this day, that whenever an estate, in freehold or in fee, is created by the word *give*, it implies a warrant for the life of the grantor.

In leases for years, the case is different. They were not originally regarded as estates in the land, but as contracts for the perception of the profits. The possession of the lessee was not regarded as in his own right, but as the possession of the grantor, and the destruction of the freehold was attended with the destruction of the lease. The lessee had no means of redress or indemnity except upon the contract. The words of the lease "*yielding and paying*," etc., were construed a covenant by the lessee to pay rent; and the words "*grant, devise*, etc.," were held to imply a covenant on the part of the lessor to pay damages to the tenant if the possession was lost. A warranty, therefore, is implied, in a lease, in a different sense from the implied warranty of a freehold. The latter depends on tenure, the former on contract. The

remedies, too, were originally different. In the latter, the disseizee recovered the value in land; in the former, damages only for the breach of the contract. Hence a warranty is *implied from [70 any contract, for the possession of lands amounting to a lease for years, no matter in what words it is framed; but the warranty of a freehold is not implied, except from the feudal term of *donation*. No other word will answer—the words "*grant*, *bargain* and *sell*," raise no warranty. Co. Lit. 384, *a*, Butler's Note; 2 Black. Com. 300.

If this had been a lease for years, the warranty would have been implied, and the phraseology of the contract, or the employment of the word rent, although awkward and untechnical, would not affect the question. 2 Marsh. 302; Petherbridge *v.* Dugan, Hamilton Co. (O.) Supreme Court, 1828. But no authority is found to justify the annexation of a warranty of a freehold to any other term than the word *give*.

Judgment for the defendant.

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## Doe on Dem. H. Raguet *v.* Peter Roll.

**In ejectment upon a mortgage, the consideration upon which the mortgage deed was executed is not examinable.**

This was an action of ejectment for a lot of land in the city of Cincinnati. On the trial, the plaintiff gave in evidence two mortgages executed by the defendant to him, for the same lot, one dated October 16, 1826, the other the 20th October of the same year; each to secure the payment of five hundred dollars. The defendant, on his part, adduced evidence to show that these deeds of mortgage were given to secure the payment of one thousand dollars, in consideration of the plaintiff's agreeing not to prosecute the son of the defendant for a theft, with which he had charged him.

Storer and Fox, for the plaintiff, submitted the case without argument.

STARR, for the defendant, relied on the decision between the same parties, in the *scire facias* suit, reported page 76 of this volume. He also contended that the law allows the party to an illegal contract to set up its illegality. 2 Kent's Com. 467; Cowp. 343. If Raguet were in possession under the mortgage, Roll could not dispossess him by showing its illegal consideration. This is the principle of the case. 11 Mass. 362. Neither party has any rights under the mortgage which the law will enforce. Both are 71] equally in fault, and the maxim *applied "*potior est conditio defendentus.*" It is a good defense that the mortgage has been paid. 1 Cowen, 122; Adams, 284, *n.* So also usury in the consideration is a good defense. 4 Conn. 436. He also referred to 11 Wheat. 258; 2 Pet. 538; 4 Ohio, 400.

Judge GRIMKE delivered the opinion of the court:

This was an ejectment on a mortgage executed by the defendant to the lessor of the plaintiff, conditioned for the payment of five hundred dollars. The defense was, that although this was the consideration expressed in the deed, yet, that the real consideration was an agreement on the part of the plaintiff not to prosecute the son of the defendant for a theft, and that the mortgage was given to secure the payment of one thousand dollars, as a reward for that purpose. In Raguet *v.* Roll, 7 Ohio, 76, which was a *scire facias* on the same mortgage, it was held that this defense might be set up for the purpose of avoiding the payment of the money; and it is now supposed that it will be equally effectual in bar of the action of ejectment. In the act under which the *scire facias* was instituted, it is provided that the defendant may plead any plea which would be good in avoidance of the land or money; so that the principles decided in the former case do not necessarily furnish a governing rule for the determination of this. The distinction between an executed and executory contract, where the consideration is unlawful, is a very plain one. In the former case, the court will not annul; in the latter, they will not enforce, and this course, so totally opposite in the two cases, is intended to be subservient to the same end, the prevention of an immoral act. As long as the agreement continues executory, there is an incentive to the commission of the deed; but when it is executed, no further motive of this kind exists, since the estate has already vested, or the money actually been paid. It may be supposed,

however, that although a deed operates an actual transfer of the title to land, yet, if it is necessary to institute an action in order to recover possession, the court will not enforce the right of recovery; in other words, that the principle *in pari delicto*, etc., comes in conflict with the other principle to which I have referred, and that it necessarily affords the governing rule of determination. Where two apparently opposite principles have been established, the presumption is that they are both intended to have effect, and *that the one shall not annul or neutralize the operation of [72 the other. The rule *in pari delicto*, etc., then will be found to be universally applicable to executory agreements only. Thus, in Hawes *v.* Leader, Cro. Jac. 270, the intestate of the defendant granted by deed to the plaintiff all his goods; the real purpose was to defraud creditors; the grantee brought an action to recover them, and obtained judgment. So in Starke's Ex'r *v.* Littlepage, 4 Randolph, 368, which was an action of detinue to recover personal property transferred by a fraudulent bill of sale by the defendant to the plaintiff's intestate, the contract was enforced, and the plaintiff recovered. The rule, then, does not apply when the policy of the law requires that a fraudulent or vicious conveyance should be enforced, and such is declared to be the law by Coke in his Commentary on Littleton, and by Powell in his Treatise on Contracts. But there are exceptions to the rule *in pari delicto*, etc., even in its application to executory agreements. Watts *v.* Brooks, 3 Ves. 612, is an instance of this, where the plaintiff and defendant having entered into a contract to be jointly concerned in ship insurances in violation of the statute, 6 Geo. I, although the court would not execute the contract, it would not exclude the result of it in decreeing a general acccount. And in Osborne *v.* Williams, 18 Ves. 379, the exception was pushed still farther; it was held that the rule "*in pari delicto melior est conditio possidentis*," "preventing suit," is not universal, and a direct decree was made in favor of the plaintiff, although the agreement was a fraud on the post office.

If the deed in this instance were an absolute conveyance, there could be no doubt then of the right of the plaintiff to recover. The real difficulty arises out of the double character of the instrument, which is evidence of a debt hereafter to be paid, and at the same time operates an actual transfer of the land to the mortgagee. Although a strong disposition existed once to treat a

mortgage as a mere chose in action, and although individual judges were heard to declare that the money was the principal, and the land only the incident, and that whatever would carry the money would convey the land, yet such is not now supposed to be the law. A mortgage is in reality a conditional fee, which is as large an estate as a fee simple, though it may not be so durable. And the case comes then within the principle, that when a conveyance has actually been executed on an unlawful consideration, the court 73] *will not merely not annul it, they will even permit it to be enforced. The cases put by elementary writers are all of them conveyances *on condition*. Thus, if a feoffment be made to one man, on condition that he shall kill another, it is said to be good and unavoidable. But in the case of a mortgage, it may be said that there are two conditions—one to be performed by the grantor, the other by the grantee; the former is to pay the one thousand dollars, the latter is to suppress a criminal prosecution. This is the apparent, but it is not the real nature of the transaction; and it is in consequence of this false appearance, that the question seems to be surrounded with an unusual decree of difficulty. A mortgage is in reality an actual payment of the debt, as well as an actual transfer of the land, although, in consequence of the land being sometimes greater in value than the debt, *an equity* was supposed to arise in favor of the mortgagor, which was called his right of redemption, and which is now extended to every case of a conveyance by way of mortgage. It is a mere equity, then; an equity which is not recognized by a court of law, but only by a court of chancery; an equity which, proceeding on the ground that the debt has already been paid in one way, enables the grantor, on certain terms, to pay it in another. There is, then, no real difficulty in the case, however intricate the questions presented may at first sight appear to be. The testimony offered to impeach the deed was improperly admitted, and there must therefore be a new trial.

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CHARLES W. HOWARD, ELIZA M. HOWARD, JAMES M. HOWARD, SAMUEL G. D. HOWARD, AND ISABELLA HOWARD, ABRAHAM J. TURWILLIGER AND MINERVA HIS WIFE, GILBERT TURWILLIGER AND ANN B. HIS WIFE, JAMES BURREN AND SALLY HIS WIFE, AND JOHN W. ALLEN *v.* GEORGE BABCOCK AND CLARISSA HIS WIFE, ELIZA A. WILLIAMS, EUNICE WILLIAMS, HANNAH E. WILLIAMS, OLIVER S. WILLIAMS, AND HIRAM WESTON.

Administrators make a beneficial arrangement to rescind an unexecuted contract of the intestate, for the purchase of lands; chancery will not aid the heir to set it up again.

THIS is a case in chancery reserved in the county of Portage.

The complainants, with the exception of John W. Allen, are the heirs at law of Horatio Howard and Harvey E. Howard, and Allen claims to be the assignee of the other complainants. The defendants are the heirs at law of Paul *Williams, and with [74 the exception of George Babcock and wife, are infants.

It is unnecessary for the understanding of the principle decided by the court to give a full history of this case, as it appears upon the record. So far as material it will be done. It appears from the bill, answers, exhibits, and testimony, that on February 11, 1828, a contract was entered into between the said Paul Williams of the one part, and the said Horatio and Harvey A. Howard of the other, whereby Williams agreed to sell to the Howards, at and for the sum of five thousand dollars, his interest in certain town lots in the town of Akron, and also some land adjoining. The said sum to be paid as follows, to wit: one thousand dollars on May 1, 1828, with the interest from the first day of April preceding, and one thousand dollars upon the first day of May annually thereafter, until the whole should be paid, provided a certain contingency specified in the contract should happen. But if said contingency did not happen, then the balance of four thousand dollars to be paid in annual installments of five hundred dollars each, on the first day of May, commencing May 1, 1829.

The Howards were to have the possession of a part of the premises, which was taken accordingly. It was agreed that on May 1, 1828, "upon the payment of the sum of one thousand dollars," Williams should execute a deed with full covenant for the premises

to the two Howards, who agreed at the same time to execute a bond and mortgage to secure the deferred payments.

No payment was made on May 1, 1828, and the reason assigned is, that on that day Horatio Howard lay dangerously sick, and continued for about ten days thereafter; at the same time Harvey E. Howard was absent from the country. Complainants allege, that Williams assented to the delay of payments, but of this there is no sufficient proof. It is in evidence, however, that at and after the said first day of May, he was anxious to receive payment. On the 17th day of the same month, he died after two days' sickness, no payment having been made upon the contract, and no mortgage having been executed. Within three or four months thereafter, both the Howards died, no payment having been hitherto made.

Owing to sicknesss and other causes, real property in Akron 75] depreciated in value, and continued to depreciate until 1831 *or 1832. In March, 1829, the property sold by Williams the preceding year to the Howards, for five thousand dollars, and which, at the time of the sale, seems to have been no more than a fair price, was not worth more than three thousand, and could not, in the opinion of witnesses, have been sold for more than twenty-five hundred. Since 1832, it has been rapidly increasing in value, and is now worth from thirty to forty thousand dollars.

After the death of the original parties, the administrators of Williams pressed those of the Howards for payment of the purchase money due upon the contract. Payment, however, was refused, upon the ground that if made the consequence would be that all the property of the Howards would be exhausted; and that the avails of these lands, in connection with other funds belonging to the estate, would not be sufficient to pay the contract price of the land and the other debts due from the estate. At length the administrators of the several parties entered into the following agreement, which was indorsed on the original contract: "Middlebury, March 30, 1829. In consideration of three hundred dollars, by Isaiah Brown, administrator of Horatio Howard, and Isaiah Brown and Jonathan F. Finn, administrators of Harvey A. Howard, paid to Amos Shin, jr., and William Slater, administrator of Paul Williams, it is mutually agreed that the within agreement be wholly rescinded, and the same is hereby wholly and entirely rescinded, annulled, and the heirs and executors and admininistrators of the said Horatio and Harvey A.

Howard are entirely discharged from the observance and performance of the same.

"Administrators of P. Williams, deceased, William Slater, Amos Shin, jr. Administrators of Horatio and Harvey A. Howard, Isaiah Brown, Jonathan F. Finn."

It was with much reluctance that the administrators of Williams entered into this agreement. Nor did they do it until after consulting with the widow and only heir of Williams of full age, and the guardian and friend of the infant heirs. Charles W. Howard, one of the complainants, was also consulted and assented to the arrangement, but at the time he was a few months within age; at the time this arrangement was made, the land was worth but little, if any more than one-half the money Howard had agreed to pay for it, and the *rescission was supposed to be highly [76 beneficial to their estates, while it was equally injurious to that of Williams.

After the rescission, the heirs of Williams took possession of the land, and it has since been partitioned among them.

At the March term of the court of common pleas of Portage county, 1832, the administrators of the Howards filed their final settlement accounts, and the balance in their hands to be distributed was found to be about thirty-two hundred dollars.

After the lands began to rise in value, Charles W. Howard, who had then become of full age, expressed regret that the contract had been rescinded, and this regreat seemed to increase in the same ratio with the increase of the value of the land. But he always spoke of the contract as one that had been rescinded or abandoned.

The prayer of the bill is for a specific performance of the contract, and that the defendants may be decreed to convey to John W. Allen, who claims to have the beneficial interest in the contract, by assignment from those of his co-complainants, who are of full age, and from the guardians of such as are infants. It ought to be stated that the heirs of the Howards, at the time of their death, were either *feme covert* or infants, with the exception of one, and that a female.

WILCOX, for the complainants:

It can not be seriously insisted that the arrangement made between the administrators of the parties was in any respect bind-

ing upon the heirs. Upon the death of Williams, the legal title descended upon his heirs, and upon the death of the Howards, the equitable title descended to their heirs, and neither can be divested, except by the order of some court of competent jurisdiction. The interest of the Howards was real estate, and the administrators could not control it. 6 Johns. Ch. 398.

Although Charles W. Howard was consulted, he was then a minor, and at the time, and ever since, has been, doubtless, mistaken as to the powers of administrators. Since arriving at full age, he has done no act to confirm the arrangement made by the administrators. 5 Ohio, 150; 10 Pet. 58.

The first installment was not paid when it became due, in consequence of the sickness of Horatio Howard, and since that time the situation of the parties concerned has been such 77] *that the contract could not be performed without the aid of a court of chancery. The complainants are not, therefore, chargeable with laches.

POWERS, for defendants:

There is now no equity to set up this contract against the defendants. Courts of equity decree specific performance of contracts, when the action at law has been lost by the party seeking such performance, only in cases where it is *conscientious* that the agreement should be performed; and has the arrangement made on March 30, 1829, no bearing upon the question whether it be now equitable and conscientious to insist upon the performance of the contract of February, 1828?

Circumstances were such at the time this arrangement was made, that had the administrators of the Howards attempted to comply with the contract, the entire estate of their intestates must have been sacrificed; but by making the arrangements, they were enabled to save for the heirs more than three thousand dollars. Having received this benefit, it is not conscionable that they should now, because circumstances have changed, seek and receive a further benefit by disaffirming that arrangement, which, when entered into, saved their estate from annihilation.

But there is another view of the question, resting upon common and familiar principles, which is of great weight. The personal and legal representatives of Paul Williams had the same power and control over the contract on his part as he would have had if

living. By the failure of the Howards to pay the first installment of one thousand dollars on May 1, 1828, and the refusal of their administrators in March, 1829, together with the probability of great delay, the representatives of Williams had a right to rescind the contract and resume the land. They did so, and the act had the concurrence of all concerned. Sugden on Vendors and Purchasers, 439, mar. 511, top paging.

The present complainants can be in no better situation than would the Howards had they lived. The case, then, would be this: The contract was made in 1828, one thousand dollars to be paid on the first day of May of that year, and the balance of four thousand to be paid in four or eight annual installments, depending upon a contingency. *The payment in May, 1828, was [78 not made, and in March, 1829, payment still being refused, the vendor declares the contract at an end, and resumes the possession of the land. This conduct of the vendor is seemingly acquiesced in. The land in 1832 begins to rise in value, and continues rising until it is worth five or six times what it was when the contract was made. Still nothing is done by the vendor; no offer of payment; he lies by until 1835, and then files his bill for a specific performance. Under such a state of facts, a complainant would not, according to the rules of equity, be entitled to relief. 1 Mar. Ch. 417; 13 Vesey, jr. 225; Sug. Vend., 9 ed. 429; 6 Wheat. 528.

Judge HITCHCOCK delivered the opinion of the court

In the argument of this case, counsel for the complainant have labored to convince the court that the delay in paying the amount due upon this contract ought not to excuse the defendants from performance. And the strong reason urged is, that, owing to the death of the original parties, the stipulation of that contract could not have been complied with. There was a defense, however, on the part of those under whom the complainants claim, while all the parties to the contract were in full life. The first payment was not made when it fell due, and it is not a sufficient excuse to say that one of the vendors was then sick. The other being well, might have attended to the business. It would seem, however, that the vendor was not disposed to take any advantage of this default; for from anything that appears in the case, he was willing to the day of his death to have received

this payment. After his death, although there would have been more difficulty in carrying the contract into execution, still it might have been done. Power is vested in the courts of common pleas to authorize administrators specifically to execute the contracts of their intestates relative to the realty. And in this case no reason is perceived why the execution of a deed might not have been compelled, upon making the first payment, and tendering a mortgage to secure the deferred payments. By payment of the whole purchase money, the execution of a deed by the representatives of Williams might have been compelled without any mortgage. In truth, the case shows that his representatives were urgent upon the subject, and would undoubtedly have been 79] willing to have sought the aid of the court, in *carrying into effect the contract, but for the refusal of the administrators of the Howards to make payment. That there has been gross and culpable negligence on the part of the Howards, and those representing and claiming under them, there can be no doubt. Whether this of itself would be sufficient to exonerate the defendants from performing, it may not be necessary for the purposes of this case to determine. There is one feature in the case which seems to us to be decisive of its merits.

On March 30, 1829, this contract was rescinded, so far as it could be, by the act of the administrators of the respective parties. This arrangement was manifestly most beneficial to the Howard heirs. At the time it was made, the land was but about one-half as valuable as when purchased, and this value was constantly depreciating, and did depreciate for two or three years thereafter. Had the administrators of Williams insisted upon the purchase money, as they had a right to do, not only the other property of the Howards must have been exhausted, but the land itself must have been sold; and even then, if any reliance can be placed upon the testimony, the avails, in connection with the other assets in the hands of the administrators, would not have been sufficient to pay the original purchase money and interest. In the language of the defendants' counsel, the estates of the Howards would have been "annihilated," and not one cent left for the heirs. Whereas, by making this arrangement, those estates were relieved from a heavy burden, and a property amounting to more than three thousand dollars secured to the heirs. This arrangement was altogether favorable to the heirs of the Howards, and it was equally unfavorable

to the heirs of Williams. At least it was so considered at the time, and for this reason his administrators were unwilling to enter into it, and did not do so, until after consulting his widow and all interested. Considering all these things, these complainants do not, so far as abstract justice is concerned, appear before this court under very favorable circumstances. Nor would they have appeared here but for the circumstances that these lands have greatly increased in value, and are now actually worth some five or six times as much as they were when purchased of Williams. This circumstance, however, is not one which will induce the court to look upon their case any more favorably; on the contrary, it might furnish a reason why we *should not interfere. It seems to us clearly, that [80 it would be altogether unconscionable to permit these heirs, who, so far as property is concerned, were saved from ruin by the indulgence of Williams' administrators, now to enrich themselves at the expense of Williams' heirs, and certainly the complainant, who claims as assignee, can be entitled to no other relief than are those under whom he claims.

But it is urged by complainants' counsel, that these administrators have no right to rescind this contract. That here was an equity in real estate, which descended to the heirs, with which the administrators had no concern, and of which they could not deprive the heirs. Is this true? To a certain extent it may be, but not, I apprehend, to the extent insisted upon. By our law, real as well as personal property is assets in the hands of administrators for the payment of debts. The only difference is, that the personal property must first be exhausted. And further, that the real property can not be disposed of without an order of the court of common pleas, acting as a court of probate. Here was an equity which descended; but it was such an equity that it could not be made perfect, or draw after it the legal estate, without exhausting itself, the legal estate, and much more. It was valueless, and worse than valueless. Under such circumstances, an administrator having made such an arrangement as was made in the present instance, this court acting as a court of equity, would not be disposed to interfere. If these parties have any remedy at law, they can pursue it. If their legal remedy is lost, chancery ought not to grant them relief.

I am not prepared, however, to adopt the principle in its fullest extent, that an administrator can have no right to interfere with

an equitable interest in lands. In the case of Livingston v. Newkirk, 3 Johns. Ch. 316, the chancellor says, "an equitable interest founded upon articles for a purchase, and which a court of equity will specially enforce, is real estate which will pass by a devise subsequently made, and if there be no devise, will descend to the heir, and the executor must pay the purchase money for the benefit of the heir." In the case of Champion v. Brown, 6 Johns. Ch. 402, he expresses doubts whether an administrator can assign such a contract, so as to vest any interest in the assignee without the assent of the heirs, and inclines to the opinion that he can not. 81] These principles seem to be founded in reason, and are *substantially recognized in our statute defining the duties of executors and administrators, which treats equitable interests in land as real estate, and requires that they should be sold with the same formality. 29 Ohio Stat. 239.

Where lands are sold by articles of agreement, and not conveyed, the purchaser is held to be a trustee to the vendor for the purchase money, and the vendor is considered as holding the land in trust for the purchaser. But where the purchase money has been paid, and the vendor refuses to make a deed, the purchaser has his election to resort to equity for a specific performance, or to a court of law to recover back the purchase money. And in case of the death of the purchaser, I see no objection to permitting his administrator under similar circumstances, if it be most for the interest of the estate, to sue for and recover the purchase money. And if he may do this, he may make any other arrangement with the vendor, which shall be beneficial to the estate of his intestate.

Again, this case shows that the administrators of Williams were pressing the administrators of the Howards for payment of that part of the purchase money which was due; but payment was refused; and the case further shows that these latter administrators were unable to pay. It is laid down in Sugden on Vendors, 9 ed. 439, that "where circumstances are such that the purchase money can not be paid for a length of time, as if the purchaser *die* or become bankrupt before the contract be carried into effect, and his executors are not able to get in the assets or effects, the vendor is entitled to have the contract rescinded." But counsel say this should be by proceeding in chancery. Why go into chancery, when the representatives of the vendor are willing to

rescind without? It can not be necessary. And it would be strange, indeed, that a court of chancery should decree the specific performance of a contract against those who had a right to rescind that contract, and who had, in fact, done all they could to rescind it.

Whether we consider this case upon the principle that this contract was rescinded by the administrators of the respective parties by an arrangement, under the circumstances, highly beneficial to the heirs of the Howards, or upon the principle last adverted to, it seems to the court that the defendants are entitled to a decree; the bill is, therefore, dismissed at the costs of the complainants.

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STATE OF OHIO, ON THE RELATION OF JACOB LINLEY, v. THOMAS BRYCE. [82

A trustee of the Ohio University can not be regarded as having vacated his place, if he has not resigned, unless there is a judicial decision that such vacation has taken place. A legislative appointment of a successor, without such resignation or adjudication, confers no legal right upon the person appointed.

THIS was a motion for a writ of *quo warranto*, to inquire by what authority the defendant holds the office of trustee in the Ohio University. A rule to show cause was served, and cause shown at the term of the Supreme Court, in 1836, in the county of Athens. The questions arising upon the rule were reserved for decision in the court in bank.

The reporter has no arguments of counsel, or information who were counsel on either side.

Judge LANE stated the case, and delivered the opinion of the court:

The Ohio University was incorporated in 1834. 2 Ohio L. 193. The governor of the state, the president of the institution, and twelve trustees compose the corporation, who are authorized to suspend any member of their body, who, from misconduct, may become unworthy, or from age or other infirmities may be

rendered incapable of performing his duties. If any such *removal* shall occur in the recess of the legislature, they are authorized to fill the vacancy, by an appointment, to endure until the end of the next session of the legislature. When a vacancy occurs, by death, resignation, or otherwise, it shall be supplied by the legislature at its next session.

In 1805, Linley was appointed a trustee by resolution. 3 Ohio Stat. 459. He then resided in Athens, and he regularly performed his duties at the board until 1828. He removed to the neighborhood of Cincinnati during that year, having the care of the church at Walnut Hills. In 1829, he removed to the flats of Grave creek in Virginia, one hundred and twenty miles east of Athens. He afterward removed to Washington county in Pennsylvania, and resided there, on January 11, 1832. Between the time of his removal from Athens in 1828, and January 11, 1832, he appears to have been present at but one meeting of the board, which was in 1830, when he transacted business with them without objection.

On January 11, 1832, by a resolution of the general assembly, 30 Ohio L. 326 the defendant was "appointed a trustee of the Ohio University, to fill the vacancy occasioned by Jacob Linley having removed out of the state."

It is conceded that the legislature have no power of appointment, except in the event of "a vacancy." Unless, therefore, 83] *the non-residence or non-attendance of Linley renders his office *vacant*, the appointment of Bryce is not good.

It is well settled that neither a neglect to exercise corporate powers, nor even an abuse of them, *ipso facto*, works a forfeiture of the franchise; that the corporation subsists until the forfeiture be ascertained and declared by a competent tribunal, in a judicial proceeding instituted for that purpose against it by government. 2 Burr. 869; 5 Mass. 230; 16 Mass. 94; 7 Pick. 344; 2 Term, 515; 9 Cranch, 51; 6 Cowen, 23; 5 Johns. 380; 16 Serg. & R. 140; 1 Blackf. 267. It is equally well settled that no member of a corporation shall be disfranchised, no officer removed, without the agency of a tribunal competent to investigate the cause and pronounce the sentence of the loss of right. The office is not vacant by neglect or abuse; it requires *an act done*, or the *exercise of power*, to work the forfeiture and determine the title to the office, 2 Black. 156; 4 Kent's Com. 127; for it is the forfeiture of a vested

right for the breach of a condition in law. Where the charter prescribes the terms under which the power of a motion is to be exercised, they must be pursued; where the organic law is silent, the corporation itself possesses the inherent power to ascertain and declare the forfeiture either of franchise or office. 2 Kent's Com. 297; 1 Burr. 517; 2 Binn. 441; 4 Binn. 448; 5 Binn. 486; Angell & Ames on Corp. 237.

This proceeding is essentially adversary in its character. The justice of the common law permits no investigation of facts which may be followed by the loss of a right, or by the infliction of a penalty, to be conducted *ex parte*. It is essential to its validity that the party should be duly summoned. 4 Black. Com. 282; 1 East, 638; 6 Conn. 542; 2 Serg. & R. 141; 1 Burr. 540; Doug. 174.

In the present case, if the relator had forfeited his office by neglecting his duties, it was necessary that the corporation, after reasonable notice to him and an opportunity for hearing, should investigate the facts, and determine his title to the office by sentence, and thus create the vacancy. Until this was done the relator was entitled to his seat, and the contingency had not happened in which the legislature could lawfully appoint a trustee.

As no statutory provision has prescribed a rule of proceeding in cases of *quo warranto*, the forms of proceeding are as *at [84 common law. As this application is made by the prosecuting attorney of the county, and the defense sets up a title to the office without objection to the authority for prosecuting, the court have adjudicated no other questions.

Writ awarded.

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## JULIUS HOUSE *v.* JOHN BEATTY AND OTHERS.

On a bill for a specific performance of a contract to convey lands, the defendant can not object to the antiquity of the claim, if the case shows his inability to perform at the time stipulated.

Defense set up against specific performance avails nothing where testimony is equally balanced.

Tender of performance avails nothing unless the party is in a condition to perform at the time of tender.

Plea of innocent purchasers for a fair consideration, interposed in support of family conveyances, can only be sustained upon clear and satisfactory proofs.

THIS cause was adjourned from the county of Huron. The material facts are all recapitulated in the opinion of the court.

BOALT and WORCESTER, for complainant

F. D. PARISH, for respondents.

Judge WOOD stated the case, and delivered the opinion of the court:

An original and supplemental bill have been filed, in this case, in which the complainant claims the specific execution of a contract.

It is set out in these pleadings by the complainant, that the respondent, John Beatty, in April, 1815, bought of Perkins, of Connecticut, two thousand six hundred acres of land in the north part of section 1, in the township of Perkins, in the county of Huron, which was conveyed to him by deed, and to secure the payment of the purchase money he executed to said Perkins a mortgage. In the same year Beatty sold a part of the tract called "the mile square," in the southwest corner of his purchase to Amherst C. Ransom, gave him a deed, and received a mortgage to secure the consideration. Ransom afterward, in 1815, conveyed by deed the "mile square" to Eleazer Lockwood, who agreed to perform Ransom's contract with Beatty; and Lockwood, on October 1, 1815, entered into the contract set out in the original bill, by which he agreed to sell to Ebenezer Ransom one hundred acres of the "mile square" off the east side, and to execute to him a good and sufficient conveyance by October 1, 1819, in consideration of two hundred dollars, for which sum he received the note or bond of the purchaser, to be paid on the execution of the deed.

85] *The bill further states that Ebenezer Ransom then went into possession of the one hundred acres, and made improvements, and in 1817, sold his interest to the complainant, House, who, with his assignees, have since held the actual possession of the land; that Lockwood, in 1822, sold his interest in this land to Beatty. The consideration which House agreed to pay to Ransom for his inter-

est in the land was two hundred dollars, payable on obtaining the title, and Beatty, by the sale from Lockwood in 1822, became entitled to this payment, when the conveyance should be made. Beatty then procured from Judge Lane, the agent of Perkins, a release of his mortgage so far as it covered this one hundred acres. He also obtained a deed from Lockwood, and Beatty and wife joined in another conveyance to House, and tendered the deeds, which House refused to accept, alleging, as a reason, that the land was *incumbered.* The bill states that House, after he acquired his interest in the land from Ebenezer Ransom, some time in 1817, or 1818, sold the west half to Hubbard, who afterward prosecuted House because he could not make a title, and the complainant was compelled to buy his peace; that in 1818, the complainant sold the east half to Robinson, who went into possession, made valuable improvements, planted an orchard, and erected a barn. That Hubbard, after the compromise with him, abandoned the land, and the complainant then went into the possession and occupied the west half himself until 1829, when he sold to Dickinson for the consideration of two hundred dollars; but knowing there would be difficulty in procuring the title, as he had then ascertained one Asa Nowler and others had a claim on the land, he gave to Dickinson his note for the consideration money paid, and agreed to convey to Dickinson only when he could obtain the title from Beatty.

The bill states further, that Beatty having thus become entitled to the debt from the complainant of two hundred dollars, which he was to pay Ransom, induced Lockwood to convey the land to his brother, Dempster Beatty, and that Dempster, prior to 1832, conveyed the west half to James; and, after the filing of the bill, but before service of the subpena on Dempster, he conveyed the east half to John W. Beatty, both grantees being sons of John Beatty; which sales, respectively, are alleged to be fraudulent, and without consideration, and with full notice of complainant's equity.

It is further stated that neither Perkins, Lockwood, nor either of the Beattys, could have made a legal title until after *the [86 partition, which was made in 1832; but that forty-five hundredths of the title was in Nowler et al., prior to that date, who brought their action of ejectment in the Circuit Court of the United States; and John Beatty, long after the conveyance was made to Demp-

ster, made himself a defendant in the ejectment, and defended for himself and those claiming under him. The plaintiffs succeeded in the ejectment, and recovered their proportion of the land. John Beatty sued out a writ of error, but the judgment was afterward affirmed. In 1830, the plaintiff in the ejectment, whose title had been affirmed by the suit in error, applied for a partition of the land, *the whole tract of two thousand six hundred acres;* that Dempster and James joined in partition, and that this one hundred acres was, by an arrangement made with John Beatty, set off to Dempster and James; that then John, immediately after the partition, brought ejectments in the names of Dempster and James for the portions allotted to them; the tenants supposed the complainant would defend, and he, believing no attention was necessary until the second term, judgment was rendered by default. The bill avers that John Beatty then compelled Dickinson to purchase the land of him by representing that House, the complainant, under whom Dickinson claimed, had failed in the action, having no title, and that Dickinson took a conveyance from James and gave him four notes for seventy-five dollars each, and assigned the two hundred dollar note given him by the complainant for the consideration, for the purchase of him, to John W. Beatty; that John W., at the instigation of his father, brought a suit on this two hundred dollars, and that John Beatty caused the other notes to be assigned to one George Donnell, and suits upon them were afterward enjoined; that all the notes belonged to John Beatty, and that the conveyance of James Beatty to Dickinson was made at the instigation of John, and without consideration.

The complainant avers that, since the partition, he has, at all times, been willing to receive a conveyance for the land from the Beattys, the brother and sons holding it, in trust, for John Beatty, and asks for the specific execution of this contract.

Lockwood answered the original bill, in which answer he says the contract between Ransom and the complainant was canceled by an arrangement between *him* and the complainant, and that he paid to House a pair of steers at forty dollars for *relinquishing the* 87] *contract.* The supplemental bill is not answered *by Lockwood, but is taken as confessed. John Beatty refers to the answer of Lockwood for the facts it contains in relation to the abandonment of the contract, and of which he personally knows nothing. He relies on the tender of the deeds to House in 1823, and alleges

that House had no knowledge of any defect in the title at that time. He denies fraud in his conveyances to Dempster, and from him to James and John W., but admits he made the contract with Lockwood, and that the conveyances from him to Dempster and from Dempster to James and John W. were made at his request, in consideration of their work and services; that their purchases were for a good consideration, and without notice of any claim of the complainant. He admits the ejectments, partition in 1832, possession, and improvements.

James Beatty's answer sets up that the land belonged to him as a gift from his father and for services rendered.

Dempster Beatty, in his answer, says that John Beatty caused the deed to be executed to him by Lockwood, and that he gave John Beatty a deed of lands in another part of the county, calculating to live on the one hundred acres himself, but did not like it, and took other lands in full, and gave James Beatty a deed of fifty acres, and afterward sold John W. Beatty the other fifty for a valuable consideration, and has received his pay; he denies all knowledge of the complainant's claim, or that he held the land by any understanding, in trust for John Beatty.

John W. Beatty, Dickinson and, Robinson have not answered the bill; as to them, it is taken as confessed. A reapplication has been filed by the plaintiff and much testimony taken; a large portion of it, however, is in answer to leading questions by the party taking it, is objected to, and should be rejected; and a greater portion still has relation to a marshal's sale of Beatty's lands, and is irrelevant to any inquiry before the court. The questions which seem naturally to arise in this case, so far as they can be gathered from the confused mass of papers, many of which are prepared by John Beatty, the principal defendant himself, are these:

1. *Staleness* of the contract, without an attempt by House, the complainant, to enforce it for so many years?

2. Was this contract abandoned by House, as set up by John Beatty, in his answer?

3. Did John Beatty comply with the contract, by the tender *of the deeds to House in 1823, and if so, had he the right to [88 consider the agreement as rescinded?

4. Was the conveyances to Dempster Beatty, the brother, and

by him to James and J. W. for a valuable consideration, and without notice of the complainant's equity?

As to the first point, the antiquated nature of the claim, it is, perhaps, a sufficient answer to say to the principal defendant, John Beatty, that before he can claim anything on this ground, he must show that he has performed, or has been ready to perform, all substantial conditions precedent, on his part, and that the complainant has omitted some obligation or duty resting on him; and, *then*, from the lapse of a reasonable time for performance by the complainant and his omission, *a relinquishment of the contract by him*, or a rescission of it, might be presumed, *but not without this.*

2. Was the contract abandoned by House? If so, there is an end of this case. Lockwood, in his answer to the original bill, to which John Beatty refers, says such was the fact. That he paid the complainant forty dollars for his interest in the contract *he* had taken from Ransom, and the complainant relinquished all right under it. Lockwood's deposition has, however, been taken, and in that *he* states that he did not intend to *swear to any such thing.* That his answer was prepared by counsel; that he stated to his attorney he had paid House, the complainant, twenty dollars, which amount House, the complainant, had paid for him in taxes for school purposes on the land; but that he did not state to his attorney, nor was such the fact, that the complainant abandoned or relinquished any rights under this contract; that if such statement was contained in his answer, it was a *mistake.* Here, then, is the whole evidence on this point. The witness for the complainant and respondents is equally worthy of credit, for he is the *same person.* There is no preponderance of testimony, and the fact must be determined against him who sets it up.

3. Did John Beatty comply with the contract; in other words, did he make a tender of a sufficient deed? It will hardly be pretended. The title to forty-five hundredths of this identical land was in Nowler et al. until the partition was made in 1832. In 1823, therefore, the title of Perkins, and Beattys, and Lockwood, who claimed under him, was defective, and the complainant was not bound to receive it. John Beatty says this fact, that the title 89] was defective, was not *known to the complainant when the tender was made. One witness, however, swears that House, the complainant, informed him of the claim of Nowler et al., and that

the witness communicated it to John Beatty, and *before his tender of the deed was made.* Beatty, then, did not, nor could previous to the *partition* in 1832, convey such title as the complainant was bound to accept, and as the complainant by the terms of the contract, was not bound to pay till the title was tendered, and as such tender has not yet been made, there has been no laches on his part, which should defeat his right to the execution of the contract; nor any performance by the defendant, John Beatty, which should discharge him from liability.

4. Was the conveyance to Dempster, James, and John Beatty for a valuable consideration, and without notice of complainant's equity?

This is most positively averred by John Beatty, Dempster, and James Beatty, in their answers; but such denials have not carried conviction to my mind, that such is the fact. The answers of the three Beattys are too loosely drawn, too general and sweeping in their denials and averments, and too destitute of any tangible point; the facts stated are too much out of the usual and ordinary course in which honest men transact business, to obtrude themselves on the credence of the chancellor. John Beatty says the conveyance to Dempster was made by Lockwood, at his request, and by Dempster to James, because he was indebted to James for work and services; but when, where, or in what amount, or the nature of these services, are not specified. Dempster Beatty says he bought the land for himself, and gave other lands in exchange, in another part of the county; but when, where, or the quantity, are entirely overlooked. There is no deed with the exhibits, nor any reference to any. James Beatty says he received the deed as a gift from his father, and for services rendered. Who can believe that these conveyances were made with any other than a fraudulent design against this complainant, and because he would not receive a defective title, and pay his money? If not, why was John Beatty so careful that the title should not pass through him, but from Lockwood directly to D. Beatty, and then to his sons? There is much testimony, however, in addition to these circumstances, which go to establish the *fraudulent intention* of all these parties, and it is equally clear that there is no evidence to establish the facts, that Dempster, James, *or John W. Beatty, [90 ever paid any consideration for this land, and the conveyances on that ground are voluntary and fraudulent as to the complainant.

But had not the defendants all *notice of the complainant's equity?*

They all lived in the same neighborhood, and the frequent conveyances and reconveyances of this property, and assignments of contracts, partition, and ejectments, could hardly have escaped the observation of all; but here was that *notorious actual possession of the land* for more than fifteen years, by House and his assignees, who were making valuable improvements on the land, and which possession is admitted by some, and must have been known to all the defendants, which was at least, if not notice in fact, sufficient to put the defendants on inquiry, and should be held to be constructive notice to all of the complainant's claim. We are, on the whole, of the opinion that the complainant is entitled to the *specific execution* of this contract; and, as it may be uncertain what amount is due by complainant to Beatty, and on payment of which a specific execution will only be decreed, the case is referred to a master to take an account, and the cause continued.

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JESUP W. SCOTT *v.* WM. FIELDS AND OTHERS.

On a bill for the specific performance of a contract for the sale of lands, time is to be regarded as of the essence of the contract, if the parties have so stipulated in the agreement sought to be enforced.

THIS was a bill for specific performance, and the material facts growing out of the bill, answers, and exhibits are these: On January 13, 1835, the defendant, William Fields, by a written agreement of that date, sold to the complainant the land in controversy, for the sum of eight hundred and thirty-one dollars, payable as follows: one hundred dollars in hand, two hundred dollars on March 13, 1835, two hundred dollars on June 13, 1835, and three hundred and thirty-one on January 13, 1836. The third installment to be with interest from March 1, 1835, and the last from the date of the agreement. The contract was signed by both parties; the defendant, Fields, agreeing, in consideration of the above payments, to convey to the plaintiff by a good and sufficient deed. But the contract also contained this clause, that "the said party of the second part (Scott) agrees and binds himself to make
91] the *payments for the said land in all respects as above

specified, and in case of his failure to make said payments, he agrees to forfeit the payment now made, and to have this agreement considered null and void; and it is further agreed that the said party of the first part is to give possession of the said lot on the first day of March next." The vendee went into possession. The one hundred dollars were paid in hand. The second installment was paid 27th February, fourteen days before it was due. The third was not paid at all, but on 29th July, forty-five days after it was due, the complainant told the respondent he had the money and was ready to pay, but made no tender and gave no further evidence of his ability to do so. On the 21st July, Fields sold and conveyed the land to Anderson, Justice, and Ransom, the other defendants, who had actual notice. On the 29th of July, when Scott informed Fields that he had the money to pay the third installment, Fields informed him that he had sold, and that he was ready to refund the second installment, and same offer was made about August 1, 1835. At the time the last installment was due, the vendee tendered all the purchase money and interest, which was refused.

The case was elaborately argued by WILCOX, COFFINBURY, and SPECK, for the complainant, and by GOODENOW and PURDY, for the respondents.

For the complainant it was argued that the vendor is attempting to enforce a rigid rule of forfeiture, and that in such a case all doubts should be resolved in favor of the vendee. That there can be no forfeiture until there shall be a failure to make all the payments. The language is not as in (1 Johns. Ch. 370,) either of said payments or any of said payments, but only the said payments. The case of Gibbs *v.* Champion, 3 Ohio, 335, was also relied upon; as also 4 Ves. 667-686; 13 Ves. 224; Cro. Car. 241.

For the respondents it was said that it was no longer the rule that time is of the essence of the contract, not even where it is not expressly made so, and *a fortiori*, where it is made a positive stipulation of the agreement; that the dictum attributed to Lord Hardwicke and the decisions of Lord Thurlow have been disapproved of and repeatedly overruled both in England and America. 4 Ves. 686; 5 Ves. 722, 818; 13 Ves. 225; 3 Leigh, 187. That the error, in reference to the *lapse of time has arisen [92

out of the doctrine of courts of equity on the subject of mortgages, trust estates, and penalties, in which time has been considered immaterial. 7 Ves. 273; 12 Ves. 326; 1 Johns. Ch. Cas. 370. That lands in this country were a species of merchandise, and that even if the rule were as contended for by the complainant, in England, that it would produce manifest injustice to establish it here; that where the subject matter, which is bought and sold, is, in its nature, exposed to daily variations in value, time is of the essence of the contract. 1 Russ. 397. The cases in 2 Sch. & Lef. 544, 603; 2 Br. C. C. 447; 6 Madd. 26; 12 Ves. 326; 3 Meriv. 84; 4 Br. C. C. 333, 393; 2 B. & B. 94; 4 Br. C. C. 469, were also commented upon and examined.

Judge GRIMKE delivered the opinion of the court:

This cause has been argued with great ability, and I am obliged to the counsel for the assistance they have afforded me in the investigation of a very difficult department of the law. The law, with regard to the specific performance of contracts, has been surrounded with so much uncertainty that it is almost impossible to extract from the reported cases any definite rule to guide us in our researches. We are compelled to say, as was said by Sir Samuel Romilly when applied to for advice, that he would give an answer to the questions propounded to him, when the precise point had been determined. In equity jurisprudence, we expect to find distinctions less rigorous than are to be met with in a court of law, because it is one object of that jurisdiction to mitigate the unyielding and inflexible temper of the common law, and when this is attempted, we come necessarily to deal more with the intentions of men, and to make inquiry into what may be the consequences of their actions, instead of confining ourselves to a strict and literal interpretation of their contracts. But it is evident that this course, unless conducted with the greatest prudence and discretion, will be calculated to defeat its own object, and that instead of introducing the genuine principles of equity into our jurisprudence, we will render it more dark and intricate than it was before. The specific performance of contracts constitute a great head of chancery relief, and yet to this day, when the question is asked whether time is ever of the essence of the contract, we are disposed to say with Sir Samuel Romilly that we will

answer *the question whenever the precise point is deter- [93
mined.

Lord Harkwicke, it is said, first laid down the rule in Gibson v. Patterson, 1 Atk. 12, that time is not of the essence of the contract, but Lord Loughborough, in Lloyd v. Collet, 4 Br. C. C. 469, says he had looked into Lord Hardwicke's note book, and that no such *dictum* is to be found; that the case was a clear one for the complainant, without any reference to the lapse of time; and that it was determined entirely on the evidence, of which the reporter has taken no notice. Nevertheless, Lord Eldon, in Levy v. Lindo, 3 Meriv. 84, observes that Lord Thurlow, "on occasions without number," did declare that time was immaterial in contracts. It is easy to see, however, that there are reasons in Great Britain for holding this doctrine, which do not exist in this country. There titles are exceedingly complicated, in consequence of their refined and artificial modes of conveyance, and they are not all on record as they are with us. The consequence is, that it is a matter of great labor, and one which requires time, to make out what is called *an abstract of the title.* Most of the English cases, when examined, will be found to turn on this point. Even in Gregson v. Biddle, before Lord Thurlow, in 1784 (which contains the strongest declaration he ever made on this subject), that was the case. There was an outstanding legal title which could not be got in within the two months. It was the case also in Gibson v. Patterson, and although the *dictum* attributed to Lord Hardwicke in that case, has been denied, yet I see no improbability in supposing that he made it. Where the titles to real estate are so universally intricate, and so well known to be so, it does not seem very unreasonable to suppose that a purchaser had made allowance for it. The consequence is, that the English courts were disposed to regard time only as a *circumstance* and not as possessing sufficient force of itself to avoid the contract. But this rule was soon found to be attended with infinite mischief, and that in endeavoring to do justice, injustice would be inevitably done. Accordingly, in Lloyd v. Collet, 4 Br. C. C. 469, which was the first well-considered case on this subject, it was held that, although the conduct of the parties, inevitable accident, etc., might be a ground of relief, yet, that it was a very different thing to say the appointment of a day should have no effect. The chancellor says, "if a given default will not do, what length of time will do?" "The plaintiff says, by

94] my own default an equity *has arisen to me. It is a singular head of equity." And this doctrine has been followed up and sustained by Harrington v. Wheeler, 4 Ves. 686; Omerod v. Hardman, 5 Ves. 722; Guest v. Homfray, 5 Ves. 818; and Alley v. Deschamps, 13 Ves. 225. In this last case Lord Erskine says, "my judgment proceeds upon a plain principle, that a bill for specific performance of an agreement will not be endured, nothing farther having been done than the payment of one hundred pounds." "It would be a very dangerous thing to permit parties to lie by, to see whether the contract will prove a gaining or losing bargain." And I believe the mind of every man who has reflected much on this subject has been convinced that this is the correct view. The great difficulty consists, not in deciding what is right, but in settling a doctrine which has hitherto been considered unsettled. You are afraid of taking parties by surprise. As long as a rule of law is attended with uncertainty, both parties seem to have a right to take advantage of that uncertainty. But it is obvious that this can not always continue to be the case. No court could be true to itself, much less to the interests of those whom it is bound to protect, if it were instrumental in confusing the boundaries of the law.

In all the cases which I have referred to, except Gregson v. Biddle, there was a clause inserted in the contract expressly declaring time to be of its essence. That is the case in the present instance also. It is expressly agreed by the parties, that "on failure to make the payments the agreement shall be considered null and void. Gregson v. Biddle, I have shown, has been overruled. In Seton v. Slade, 7 Ves. 265, there was a clause inserted, that on failure to pay, the proprietor should be at liberty to resell. Lord Eldon says: "I incline much to think, notwithstanding what is said in Gregson v. Biddle, that time may be made of the essence of the contract." A specific performance, however, was decreed; first, because although the vendor, on non-compliance with the conditions, had liberty to resell; yet the contract was not declared (as in this case) to be at an end, a distinction which I confess does not seem to me to have much force; and secondly, that the vendor had done acts which unequivocally amounted to a waiver of any default on the part of the plaintiff: so that this case also overruled the *dictum* in Gregson v. Biddle.

In Vernon v. Stephens, 2 P. Williams, it is denied that any

agreement can be so framed as to make time of the *essence [95 of a contract. But it was unnecessary to make any such declaration; for there, also, there were unequivocal acts of waiver. An idea seems to have been entertained that such an agreement would be an attempt to oust the court of chancery of its jurisdiction. But surely the jurisdiction of that court does not depend upon the mere circumstance that a contract has been made, and that the specific performance of contracts belongs to it exclusively. It depends also upon the fact whether the contract is such as to entitle it to be executed. It is now admitted that the lapse of time is a matter which must be taken into consideration, even where it is not declared to be of the essence of the agreement. Time, then, is an important ingredient in contracts. Would it not, then, be extraordinary if the parties were not permitted to declare it so. A mere agreement to refer a matter to arbitration would not deprive the courts of their jurisdiction; but an agreement that there should be no suit at law or in equity would do so, because it would be simply giving effect to a plain contract without violating any rule of public policy. Indeed, I take it that no rule is now more firmly established than that parties may make time of the essence of the agreement. Such a rule seems to be absolutely necessary to the administration of justice, and even to the being able to see our way with any degree of clearness in the interpretation of contracts. The very desire to introduce a principle of equity and a liberality of construction in expounding those contracts where the intentions of the parties remain doubtful, ought to constrain us to pause at some boundary beyond this uncertain field of conjecture; otherwise, instead of applying a rule of equity professing to be founded upon the intentions of the parties, we shall openly proclaim that we have no regard to those intentions when they are expressed in the most unequivocal manner. In Jackson v. Ligon, 3 Leigh, 187, the chancellor says: "That the parties may make time of the essence of the agreement is now clearly admitted, and seems to follow from their unquestioned right to frame their contracts as they please." It is not like a case of forfeiture; the penalty of a bond, for instance, from which a court of equity will relieve, on the same principles of public policy, as have occasioned the enactment of usury laws.

But the leading case on this subject is Benedict v. Lynch, 1 Johns. Ch. Cas. 370. It is an American case, and I shall always

96] *give a preference to the American over the English cases, other things being equal; for I do not believe that a judge is bound to deal only with abstract principles of law. It is his duty also to understand the habits and condition of the people among whom he lives, and this he will be best able to do by studying the adjudications which have been made in his own country. Benedict v. Lynch contains the most thorough and perspicuous examination of the law on this subject of any case which is extant. There was a stipulation "that if the plaintiff failed in either of his payments the agreement was to be void;" and the chancellor upheld the stipulation and dismissed the bill. But it is said there is a difference between the stipulation in that case and in the one now before the court; that in the former the agreement was to be void if the plaintiff failed in either of his payments, and in the latter it is to be void if he fail to make the payments. But no human ingenuity will be able to satisfy the mind that there is any substantial or even any plausible difference between the phraseology in the two contracts. The last secures the punctual performance of all the payments; the plaintiff has failed to pay the third installment, and if the whole includes the parts, nothing is more certain than that he has neglected to make *the* payments. How, then, can it be said that the complainant is entitled to a specific performance when he has been guilty of a violation of his contract—a contract drawn with the most guarded precision and care, and intended to impose terms upon the respondent as well as upon himself? The law is intended to be a help to morality; it is intended to set an example to the community, with how much ease the great principles of justice may be maintained and dispensed, and of how great importance it is to the welfare of individuals that they should be inviolably preserved. But if a loose morality should begin here, and a loose administration of the law is nothing more or less than a loose morality, it will be impossible for parties to feel that degree of confidence in our courts which they are entitled to feel. And however the technical forms in which our law is wrapped up, may contribute to blunt our feelings as men, yet it is impossible for an upright tribunal not to desire both to do justice and to inspire confidence. On the whole, the conclusion to which we are brought is, that the parties have made time of the essence of this contract; that the complainant
97] has violated the agreement by failing to pay *the third in-

stallment, and the bill is therefore dismissed, but with a decree for the payment back of the second installment, since that also was the stipulation of the parties.

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SYLVESTER RUMMINGTON *v.* ISRAEL AND THOMAS R. KELLEY.

Although a contract for the sale of lands contains no express stipulation that a failure to pay shall authorize the vendor to rescind, yet the vendor may upon such failure, by prompt action and proper notice, put an end to the contract, so that equity will not decree a specific performance.

THIS is a case in chancery reserved in the county of Cuyahoga.

The case, as made by the bill, answer, exhibits, and testimony, is as follows. On June 16, 1831, a contract was entered into between the complainant and defendants, by which the defendants agreed to sell to the complainant a certain piece or parcel of land, as described in the contract, in the then village of Cleveland, for the sum of four hundred and sixty dollars, to be paid in four annual installments, and when paid they were to execute a deed. The complainant gave four several notes for the purchase money, payable as follows, to wit: one hundred and twenty-four dollars on June 16, 1832; one hundred and eighteen dollars on June 16, 1833; one hundred and twelve dollars on June 16, 1834; and one hundred and six dollars on June 16, 1835. It was further agreed that the complainant might pay these notes before they fell due, and in case of such payment, interest was to be deducted. There was no stipulation in the contract that the vendee should have possession of the land.

The first note which fell due on June 16, 1832, was not paid at maturity; and in the latter part of the same month, or in the beginning of July following, the defendants stated to the complainant, that inasmuch as he had not complied with his contract, in making the first payment, they considered the same forfeited or void, tendered to him his notes, and upon his refusal to receive them, deposited them in the hands of a third person for his use.

On May 9, 1833, the complainant tendered to the defendants one hundred and thirty-one dollars, the amount supposed to be

due upon the first note; and on June 16, 1835, he tendered the sum of five hundred and sixty dollars, the full amount due upon the contract. This money was refused; the defendants insisting that the contract was at an end, and no longer obligatory upon them.

98] *It is alleged in the bill, that immediately after the contract was made, the complainant took possession, and made lasting and valuable improvements upon the land, and that the defendants have recovered a judgment against him in ejectment, and are about to turn him out of possession. The answer admits that the complainant is in possession, but denies that he took possession until after July, 1832, and after his notes had been tendered to him. It further insists that he took the possession and made the improvements against their express prohibition, without their knowledge, and during their absence from Cleveland, of which place they are residents. Upon this part of the case there is testimony taken which is somewhat conflicting.

The prayer of the bill is for an injunction against the judgment in ejectment, and for a specific performance of the contract.

WILLEY, for complainant:

Insisted, that inasmuch as the parties had not by express stipulation made time of the essence of the contract, the failure of the complainant to pay the first installment, as it fell due, did not release the defendants from the obligation resting upon them to make a title. It did not put it in their power to rescind. The assent of both parties is equally as necessary to rescind as to make a contract.

He stated that one of the modes of conveying in the northern part of the state was by land contract. That this mode was adopted as being more convenient than the circuitous mode of conveying by deed, and then taking back a mortgage to secure the payment of the purchase money. In either case, the object was the same, to secure to the vendor the price for his land; and he contended that the same rule of decision should be adopted. As in the case of a mortgage, the mortgagor, remaining in possession, would be allowed after any length of time to redeem; so the vendee, holding under contract, should be allowed to compel a title upon the payment of the purchase money, although that payment had not been made within the time prescribed.

He further urged, that in the case before the court, even admitting the right of the defendants to rescind, it was not sufficient for them to have tendered the notes merely; they should also have tendered to the complainant compensation for *his improve- [99
ments. Having failed to do this, he insisted they were still bound by the contract.

He cited 1 Vern. 449; 16 Ves. 102; 19 Ves. 143; 2 Price, 200; 3 Campbell, 138, n. *a*; Newland on Contracts, 316–318; 2 Swift's Dig. 84–90; 3 Ohio, 335; 2 Johns. Cas. in Error, 314; 6 Wheat. 195; 5 Cranch, 262; 3 Johns. Ch. 316; Powell on Contracts, 268.

ANDREWS and FOOT, for defendant:

Insisted, that as the contract did not give the complainant a right to take possession of the land, the fact that he was in the actual possession could be of no avail to him. But they argued that the weight of evidence was in favor of the answer, which denied that the complainant went into possession until after July, 1832, and insisted that the possession then taken was tortious, being in contravention of the express prohibition of the defendants. They further claimed that the defendants had the right to rescind the contract upon the failure of the complainant to make payment; that they had rescinded it, and were no longer bound by its terms. In support of the defense, they relied upon the following authorities: 9 Johns. 34–331; 4 Dev. 235; 4 Bro. C. 469; Newland on Contracts, 242; Sugden on Vendors, 3d ed. 268; 1 Johns. Ch. 370; 4 Dev. 559

Judge HITCHCOCK delivered the opinion of the court:

So far as the facts of this case are concerned, there can be but little difficulty. The only controversy is, whether the complainant took possession of the premises before the tender made to him of his notes, and whether before that period he had made any lasting and valuable improvements.

The contract did not give him the right of possession in express terms or by implication; still, with the consent and acquiescence of the defendants, he might have taken possession; and if, under such circumstances, improvements should be made which are lasting and valuable, it would seem to be equitable that a vendor, before he shall be permitted to rescind a contract of sale, should make compensation for such improvements. We have carefully

examined the evidence, and without recapitulating the testimony of the several witnesses, shall merely state the impression made upon our minds by that examination. There can be but little doubt 100] that the complainant *exercised some acts of ownership over the property after the contract, and before the tender referred to, but that he made any valuable improvements is not shown. Nor does it appear that he had any exclusive possession. The lot was vacant until after the period of the tender. There is no evidence that the defendants knew of the exercise of these acts of ownership, but the contrary is inferable from the circumstances that when they made the tender, they forbade the complainant to take possession. The only improvements of consequence which have been made upon the lot, is the erection of a small dwelling house, and the weight of evidence conclusively shows that this house was erected in the spring of 1833, during the absence of the complainant from Cleveland. The circumstance that it should have been done at such a time is, to say the least of it, somewhat suspicious.

An opinion seems to have prevailed to a considerable extent, that in contracts for the purchase and sale of real estate, time is of little consequence. In the case of Gregson v. Riddle, cited in 7 Ves. 268, Lord Chancellor Thurlow is said to have intimated that time could not be made of the essence of the contract, even by a positive stipulation of the parties. This opinion, that time constitutes no part of the essence of the contract, has been strengthened probably in the northern part of the State of Ohio, and especially on the Connecticut Reserve, by the peculiar situation of the country, and the manner in which lands have been sold. This tract of country was originally conveyed by the State of Connecticut to purchasers from the state, comparatively few in number. In its early settlement, these purchasers, who have been usually denominated original proprietors, sold out small tracts to actual settlers, and generally upon credit. Lands, thus sold, were not, however, generally conveyed by deed, but the purchaser took a contract, in which the terms and times of payment were specified, and in which it was stipulated, that upon payments being made, the vendee should be entitled to a deed. Under these contracts, possession was generally taken with the assent of the vendors, and large improvements made. As is frequently the case in new countries, most of these actual settlers, if not absolutely poor, were in but moderate circumstances; consequently, payments were not made

according to the stipulations of their contracts. In most instances, these delays were acquiesced in by the original proprietors. It *was their interest thus to acquiesce, for otherwise the coun- [101 try could not have been settled, and their lands must have remained a burden upon their hands. So uniformly has this been the case, that scarce an instance can be found where an original proprietor has attempted to defeat a vendee of his purchase, merely upon the ground that punctual payment had not been made. Consequently, it has been pretty generally supposed that failure to pay punctually on the part of the vendee, could not operate to exonerate the vendor of his liability, and that the time of payment specified in the contract was of little consequence. I am not aware, however, that the decisions of our courts, when carefully examined, will be found to have favored this opinion. Whatever may have been the opinion of Lord Chancellor Thurlow, all the modern cases go to show that time may be made of the essence of a contract. This subject is fully examined in the case of Benedict v. Lynch, 1 Johns. Ch. 370, in which Chancellor Kent comes to the conclusion that time *may* be made a part of the essence of the contract, if it is not so in all cases. On this subject, too, reference may be made to Sugden on Vendors, 9 ed. 441, and the cases there cited.

It seems to us that this is a reasonable principle. There is nothing in the character of contracts for the sale and purchase of lands, that places it in the power of either party to trifle with the other by violating a contract on his part, and then, at his own convenience, by offering to make compensation, compel a specific performance. In courts of law, time is considered as of the essence of all contracts, and courts of equity are as much bound to see that contracts are executed as courts of law. That man who would call upon a court of equity for a specific performance must, in the language of the books, show himself to have been "*ready, desirous, prompt, and eager.*" If, therefore, a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent; for he can not proceed against the other without an actual performance of the agreement on his part, or a tender and refusal. Sugden, 9 ed. 245. But although courts of equity are bound equally with courts of law to enforce contracts, still there are cases, and they are not unfrequent, where they will relieve against lapse of time, and decree specific performances. But this is owing rather to *the peculiar circumstances of each par- [102

ticular case, than to the consideration that time is not of the essence of the contract.

In case there has not been on the one part a strict compliance, still if the conduct of the opposite party has been such as to evince acquiescence in the delay, such acquiescence will be construed favorably for the party apparently in default, and the opposite party can not be exonerated from performance. For instance, a vendee takes possession of the land purchased, and with the knowledge and assent of the vendor makes lasting and valuable improvements; in such case, a court of equity would be inclined to enforce a specific perfomance, although payment of the purchase money had not been punctually made. More especially would this be the case where improvements had been made without objection, after default of payment. So the receipt of a part or the whole of the purchase money, after the time of payment had elapsed, might be construed into a waiver on the part of a vendor, of any advantage he might have taken in consequence of the default of the vendee. And the same would be the case, should the vendor by any other conduct manifest that he did not intend to insist upon a strict and literal performance by the other party. And even where the purchase money is payable in installments, and there should be a failure in the punctual payment of one of these installments, I am not prepared to say that a vendor should be exonerated from performance, if, within a reasonable time, the vendee should make payment. But where either party has been guilty of gross, inexcusable neglect, he can not obtain relief in a court of equity. It is apprehended that no specific rules can be established with respect to specific performances, which can be applied in every case, but each particular case must be governed more or less upon its own peculiar circumstances.

In the case before the court, the parties have not by express stipulation, made time of the essence of the contract; and the question for consideration is, whether, under the circumstances, the complainant is entitled to the relief sought for; or, in other words, whether, where one of the parties is in default without any available excuse, he can call upon the other for a specific performance.

I am not aware that a case analogous to the present has been before the court, although the case of Gibbs v. Champion, 3 Ohio, 103] 335, was somewhat like it. Champion sold land *to Gibbs by contract, and Gibbs agreed to pay the purchase money—one-

half on the 26th day of January, and the other half on July 26, 1826. Nothing was paid until the latter day, and then the whole amount due was tendered. The court held that Gibbs was entitled to a specific performance; and one prominent reason assigned for the decision is, that after the default in not paying the first installment, Champion held on to the contract, and neither offered to return the notes, nor took any other steps to exonerate Gibbs from his liability. In this particular, that case is different from the one now before us. Here the defendants offered to return the notes, and when refused, they were deposited in the hands of a third person, for the use of the maker. At the time this offer was made, there had been no material change in the situation of the property or parties. No improvements had been made, no money expended, and there is no evidence to show that the value of the property had in the least changed.

It is urged by the counsel for the complainant that it is not in the power of one of the parties to put an end to or rescind a contract without the assent of the other. This, as a general rule, is undoubtedly correct, and is so as a universal rule where neither party is in default. But where there has been a default, unless the same has been occasioned by circumstances not within the control of the party in default, he can not well complain that the opposite party should not hold himself bound by a contract of which he himself is utterly regardless. In fact, such default is at least equivalent to an express assent to a rescission of the contract, and may be so considered unless acquiesced in by the opposite party.

In the case under consideration the complainant had agreed to pay the first installment of the purchase money on June 16, 1832, but failed to do it. The only excuse offered for this failure is that he was disappointed in the receipt of money. It does not appear that he made the least effort to procure the money or to comply with his obligation. He admits that he had been informed by one of the defendants that prompt payment would be expected, but states that he supposed the sole consequence of non-payment would be that a suit at law would be prosecuted against him for the money. The first installment being due, the defendants, instead of acquiescing in the delay, informed the complainant within a few days thereafter that they considered *the contract at [104 an end, tendered him his notes, and did all they could do to free

themselves from liability. By this conduct the complainant was notified, if he had not been before, of the intention of the defendants to hold him to a strict compliance. Yet notwithstanding this notice he lay entirely still for more than ten months, and then, just before the second installment fell due, offered to pay the first. Has the complainant shown himself to have been "ready, desirous, prompt, and eager?" Has he shown any sufficient excuse for his default of payment? We think not. On the contrary, he appears to have been guilty of gross and culpable negligence, and upon no principle can be entitled to relief in a court of equity.

So far as respects the improvements, they were made after the default and without the knowledge or consent of the defendants. Of course there can be no relief on this ground.

There is much ingenuity in the argument of counsel in attempting to assimilate a contract of this kind to a mortgage; but the analogy will not hold. In the case of a mortgage, the only object of the security is the payment of the money. In case of a land contract one great object is a transfer of the estate. 1 Johns. Ch. 370.

Upon mature consideration, the court are unanimous in the opinion that the relief sought ought not to be granted. The injunction is therefore dissolved, and the bill dismissed with costs.

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THOMAS DAVIS *v.* THE ADMINISTRATORS OF CATHERINE FORD.

No action accrues for a guardian against his ward upon account of advances made to the ward, until the relation of guardian and ward is determined.

Assumpsit is the proper action to be brought to recover a balance due to a guardian from a late ward, even where such balance has been declared by a court of probate.

THIS case was adjourned from the county of Hamilton. It was an action of assumpsit. The declaration contained three counts. The first recited that the plaintiff was the guardian of Catherine Ford whilst a minor; that in 1823, during his guardianship, he presented his accounts, for settlement, to the court of common pleas, and a balance was found due to him of three hundred and

seventy-four dollars and sixty-eight cents. That in March, 1832, he again presented his guardian accounts for settlement, and a further balance was found due to him of two hundred and fifty-three dollars and twenty-eight cents, for advances made to the ward. Upon these recitals the declaration averred a promise to pay.

*The second count was general for money advanced, goods [105 sold and delivered, labor performed, etc.

The third count recited the guardianship, the death of the ward, and the payment of fifty dollars for funeral expenses, whereof the administrator had notice, with the averment of his undertaking to pay, etc.

The defendant pleaded specially to the first count in the declaration *non assumpsit* within six years. The plaintiff replied that at the settlement of the first item of three hundred and seventy-four dollars and sixty eight cents, he was the legal guardian of the intestate debtor, and so remained, until within six years of the commencement of the suit, and to this replication the defendant demurred.

There is a report of this case in Wright's Reports of the circuit decisions of the Supreme Court, page 200. After the decision there reported was announced, leave was obtained to withdraw the demurrer, and a general order made to amend the pleadings. Upon this order the case was again presented for hearing, and was adjourned upon the point now presented by the demurrer.

STRAIT, for the plaintiff.

The statute of 1816 (14 Ohio L. 158, sec. 36) was in force when this account was settled, March 17, 1823, and if not wholly repealed by the statute of 1824, February 6, (reprinted 29 Ohio L. 247), must govern the case. The difference in the two statutes is not so great as to vary this matter, though they are otherwise strikingly variant.

By both of these statutes it is made the duty of the court to call the guardian to account, and the duty of the guardian to present his accounts with the ward to the court for settlement, and the court are empowered to settle with the guardian and allow him such compensation as they may think reasonable. The statute of 1824 compels a settlement within three years from the date of the letters, and every two years thereafter, and that the settlement of

the accounts between the parties shall be final, unless the ward, within two years after arriving at full age, shall impeach the same in chancery.

The court of common pleas then had full power to settle the 106] accounts and strike the balance, either for or against *the guardian; and does it not follow, that the law provides a remedy to recover that balance in the ordinary way; or is the settlement a dead letter, a mere form, and no validity farther than to equalize the accounts and balance the one against the other? Why should the resort be to a court of chancery? Why take an extraordinary remedy to recover a simple account? Wherever the law can give a proper remedy, it should be resorted to, and the extraordinary remedy in chancery only, when the other fails.

The notion that the relief is in chancery is prevalent, because in England, the court of chancery controls all matters concerning guardians and wards. It is the proper jurisdiction of the chancellor, in England, to appoint guardians, call them to account, order them to pay any balance found against them on settlement of their accounts, and provide for their compensation and advances. That court has everything connected with the matter under its control, and provides the proper remedy. *Not so here.* This peculiar jurisdiction of the court of chancery is given to the court of common pleas as a court of probate, except that the power to enforce payments by attachment, sequestrations, and the like is not an incident of the power granted. The appointment of administrators, and the settlement of decedent's estates, was within the peculiar province of the ecclesiastics in England; here it is given to the court of common pleas, and who has ever doubted the right to sue at law for the balance of the accounts settled by the court in favor of the distributee. These suits are of every day's occurrence, and never questioned. *How is it?* Wright, in his book, says these settlements are conclusive upon the guardian, but not upon the ward; he may controvert them, though the statute provides, "that the settlement thus made shall be final between the parties, saving to the ward the right to review it in chancery within two years after coming of age." Unless the ward does so review the settlement, I think it is not only final, but conclusive upon him. The provision is, to review the settlement within a given period, not to controvert it collaterally at all times, as the inference is from the report of the case.

I consider these accounts like the accounts between ordinary parties, or adults; when settled and the balance struck, either the action of debt or assumpsit lies to recover that balance, as upon an account stated. In the case of adults, the *parties state [107 their own accounts, but in this case they are stated by the probate court; the statute empowering the court to state the accounts for the minor, because his statement of them would not be binding. Such, it seems, was the intention of the legislature, and such is the good sense of the law. The action is nothing more than the ordinary action of assumpsit, founded upon an account stated. The accounts so stated in either case are final and conclusive upon the parties, unless for some mistake clearly pointed out the settlement is opened to correct that mistake and not to investigate again the items of the accounts.

V. WORTHINGTON, for the defendant:

Upon the case now presented, we possibly are precluded from investigating the points designed mainly to be discussed. The issue raised is upon the first count in the declaration, as the demurrer in its operation falls back upon the first defect in the pleadings, without regard to what follows. The sufficiency of this count was considered in 1833, and it is somewhat remarkable that the pleadings should now be so framed as to involve precisely the same point, and upon the same count. The opinion of the court is reported by Judge Wright, in his Circuit Court Reports, page 200, and probably it is only necessary for me to advert to that decision. The court say: "If this is an action of debt, as is contended, it is not barred by the plea of the statute of 1810. If it be assumpsit, it is barred. There is no *assumpsit laid* in the count, the liability is otherwise deduced; yet the defendant has plead *non assumpsit* and the statute of limitations, and the writ is in assumpsit. We think the record of the proceedings of the probate court not the gist of the action, but only an incident to the plaintiff's title; no profert of the title is made. The proceeding is conclusive upon the guardian, but not upon his minor ward. He may controvert it. The suit is a novel one, and we doubt if it can be sustained, or if the plaintiff have any relief at law; but, however that may be, there is no assumpsit in the declaration, and of course no title in the plaintiff is shown. If there was a right of action set out, it would be barred by the

statute of limitation." The plaintiff's counsel then contended this count was in debt. The court, however, held the character of the suit was ascertained from the writ, and not the declara-
108] tion. *Such, surely, is the correct doctrine, at least since the writ has been made a part of the record. A departure in a replication from the declaration is fatal on demurrer (Gould's Plead. 453), and it is believed a departure in the declaration from the writ is equally fatal under our system of jurisprudence. I am aware some interesting propositions may arise in this cause when the pleadings are properly framed; but until that is done, it seems to be a matter of supererogation to discuss them. I may, however, be permitted to remark that the replication can not aid the declaration, nor does it, in fact, attempt it as to the exception taken. It is, I believe, now well established that the plaintiff must recover upon the case made in his declaration. 7 Pet. 252. There is also another point deserving some consideration, and perhaps arises upon the present state of the pleadings. It is this: will an assumpsit lie upon a final settlement of accounts by a guardian with his ward before the probate court? On the circuit, this court, at its last session in this county, seemed to intimate, if my memory serves me, that the cause of action in this case was a record debt, and therefore doubted whether assumpsit could be maintained. In my view of the law, a settlement by a guardian or administrator with the probate court is not a record debt, and has not the force and effect of either a judgment or recognizance. It is, in fact, nothing more than a final settlement—*prima facie*, correct, and obligatory upon guardian and ward, but subject to be impeached, as all other final settlements are, by bill in chancery or otherwise. 2 Chase's Stat. 235, sec. 36; 29 Stat. 247; 7 Ohio, 71; Wright, 200. It does not follow, because the court audit under the law the accounts of a guardian, that they are not to be impeached, or are *res adjudicatæ*. Were the settlements of a guardian with the probate court made by law of the same force and effect with a judgment, then we should readily concede that they could not be opened or impeached; but as the law only makes those "settlements final," we conclude they are to have the force and effect of all final settlements between contracting parties laboring under no disabilities, and not that of a judgment at law. The intervention of the court in adjusting these accounts does not, *per se*, constitute the action of the court

into a judgment. Many of the powers exercised by our courts are not judicial. In many cases they act as commissioners or ministerial agents, and in all such cases their acts *are to be [109 viewed as the acts of all other known commissioners and ministerial agents of the law. In the case now under consideration, the record of the court is not properly the foundation of the action, but an item of evidence conducing, *prima facie*, to establish a right of action in the plaintiff. The foundation of the action is the disbursement made by the guardian. The record establishes that the disbursements have been audited by the proper agents of the law, and are *prima facie* correct, but nothing more. The action of the court upon the account current of a guardian or administrator, does not impress upon it the character of a judgment at law or recognizance, nor attach to it any of the consequences that flow from either, but simply gives to it the importance of a final settlement *in pais*, *prima facie* correct and obligatory, but subject to be impeached as all other settlements are, by putting your finger upon the excepted items. If this view of the law be correct, and an action at law can be maintained at all, it would seem that the remedy is assumpsit, and not debt. If so, then the plea of *non oritur actio infra sex annos* is a good plea and a bar to the action, unless the relation of guardian and ward prevents the running of the statute, a matter that does not properly arise in the present state of the pleadings, and need not be discussed.

Judge Wood delivered the opinion of the court;

The question which these pleadings submit for decision is, whether the matter set up in the replication is a sufficient answer to the special plea? Or, in other words, can the guardian sustain an action to recover for advances made to his ward, on a balance found due to him, on a settlement with the court, *while the relation of guardian and ward subsists?* We hold the negative of this proposition.

It is the duty of the guardian to prosecute for and defend his ward. He can not, in our opinion, for himself sustain an action against his ward, while the relation of guardian and ward subsists between them. The guardian stands to the ward *in loco parentis*. In 2 P. Williams, 119, it is said a testamentary or other guardian can not be sued by the ward, in an action of account, until

the guardianship determines; for the rule of the common law is, that the action does not lie while the guardianship continues.

110] *If the action of account would not lie, because of the relationship, why, reasoning from analogy, should the action of assumpsit be maintained? And if not, by the ward against the guardian, when the ward is favored by, and regarded as under the peculiar protection of the law, why should the action be sustained for the guardian against the ward? As the guardian is bound to sue for and defend the ward, a suit against the ward would be substantially a suit by the guardian against himself. This would be an absurdity which, we are of opinion, ought not to be recognized. In this view of the facts of the case, no right of action against the ward arose during her life time, and as she has not been six years dead, and died in wardship, we hold that the replication is good.

The defendant's counsel has assumed that the question of the validity of the plea and replication could not properly arise on the demurrer, because, by it, the case was thrown upon the validity of the first count in the declaration, which, it is alleged, contains no allegation of an assumpsit. As we read it, it does contain such an allegation. The averment is, that the defendant was liable to pay, and "*being so liable, undertook and promised, etc.*"

The action is properly assumpsit, as the counsel on both sides admit.

The demurrer is overruled, and the cause remanded for further proceedings.

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FRANCES H. ST. CLAIR *v.* JACOB WILLIAMS.

**A widow evicted of lands assigned to her as dower by title paramount to her husband, can not sustain an action upon the covenant of warranty to her husband.**

THIS is an action of covenant reserved from the county of Hamilton.

Williams, the defendant, conveyed a tract of land, with warranty, to Davis, in 1816. Davis afterward conveyed the same

land to St. Clair, who died seized in 1820, leaving the plaintiff his widow, to whom the premises were set off as dower. She has been evicted by a recovery in ejectment, under a paramount title, and she brings this action against Williams, upon the warranty in his deed to Davis, claiming that it passed with the land to her.

*Fox, for plaintiff. [111

V. Worthington, for defendant.

Judge Lane delivered the opinion of the court:

The question arising in this case is, whether the right of action upon a covenant of warranty annexed to a conveyance in fee, passes to one who holds but an estate for life in the land. It is no subject of doubt that an *assignee* is entitled to the benefits of all covenants running with the land. 3 Ohio, 219; 5 Ohio, 156. Nor is it doubted where a covenant running with the land is divisible in its nature, as if the entire interest of separate parts of land pass to different individuals, that a right of action accrues to each party, to recover his proportion of the warranty. 1 Paige Ch. 455; 2 Paige Ch. 78; Touchstone, 199; Co. Lit. 385, 386. But a plain distinction is made between the holder of a part of the land, and the holder of a part of the estate; the former may vouch as assignee, or bring *warrantia chartæ;* the latter has the benefit of the warranty by *aid prayer*, or by the voucher of him who holds the remainder. Co. Lit. 385, a; 4 Dane, 51; Wood's Conveyancing, 373. The same distinction is carried into the modern action of covenant. The *assignee*, upon whom is cast the benefit or the obligation of covenants, is he who holds the *whole* estate or term. Doug. 183; 1 East, 502. These principles settle the present suit. The plaintiff could not vouch as assignee, nor have *warrantia chartæ* under the ancient law, nor can she sustain an action of covenant, because she does not hold the whole estate. The right of action on the warranty passes to the heirs, and her remedy is by a new assignment of dower. Judgment for defendant.

## Frederick Willyard v. William Hamilton.

A company incorporated to construct an extensive line of canal, are engaged in making a public work, for which private property may be taken as in the case of other public uses.

The value of property taken for public uses may rightfully be assessed by commissioners, that not being a case for the trial by jury secured in the constitution.

This was an action of trespass for cutting timber. The defendant justifies, as an agent of the Pennsylvania and Ohio Canal Company, under the act incorporating it. The plaintiff demurs, 112] and for cause, shows that the plea does not show *that the damage has been assessed, or that any provision is made for assessing the same. Secondly, because the Pennsylvania and Ohio Canal is a private and not a public improvement, and, therefore, the company has no constitutional right to take private property without the consent of the owner.

Bierce, for the plaintiff:

Relied on article 8, section 4, of the constitution of Ohio; 5 Ohio, 120; 4 Ohio, 284; 5 Peterad. 3; 1 M. & S. 32. He contended that the rule laid down by Chancellor Kent, in 20 Johns. 735, does not apply in this case, because this is not a public work.

Todd, for the defendant:

Argued that this could not be considered a private work. The canal is to be a public highway. The act so declares. As to the mode of assessing the damages, the case of Cooper v. Williams, 4 Ohio, 253, settles the matter. The charter provides for the purchase of the whole interest in the canal by the state. It is not necessary that compensation should be assessed before a public work can progress. 5 Ohio, 118, and authorities there cited. Private property may be taken for the construction of bridges, turnpikes, etc., if provision is made for compensation, 5 Ohio, 488, and provision is made in this act. The right of trial by jury ought not to be so construed as to include the matter in question in this suit.

Judge GRIMKE delivered the opinion of the court:

This case presents some questions of very great importance, and yet, I believe, most of them have been already settled by this court. As, for instance, in 5 Ohio, 488, it has been decided that bridges, turnpikes, and highways, are public works, and in 4 Ohio, 253, and 5 Ohio, 118, that where private property is appropriated to public use, it is not necessary the damages should be assessed before the appropriation, and that the mode of assessment by commissioners is constitutional. It is very true that precedents are not of such binding authority that they may not be overruled, but they are naturally of very great weight. It is as necessary that there should be a law to restrain the court, as that there should be *rules to restrain the conduct of individuals, and [113 precedents constitute that law. The great principle on which society is constructed in this country is, that the welfare of the community is superior to that of private individuals, which is just the reverse of what it is in most other countries, where the welfare of the community is considered as subordinate to that of private individuals. Hence, the spirit of public improvement has been carried further in the same period of time, in this country, than in any other. Highways, turnpikes, and canals are constructed, because the public have an interest in them, and it is of more importance that the public should not be deprived of the right to have them constructed, than it is that private individuals should not be deprived of any of their privileges. And the security to the individual members of society is almost perfect where there is a genuine exercise of the right. But what shall be the test, whether a work is to be deemed a public improvement? It can not be the fact of its having originated with the legislature, or of its being conducted exclusively by agents appointed by them; for roads constructed under the authority of the county commissioners, are as much public works as state roads which have been established by the legislature. The inquiry, then, must necessarily be what are the objects to be accomplished; not who are the instruments for attaining them. A canal, traversing the whole length of the state, may be constructed by an incorporated company, while a road of twenty miles may be laid out under the authority of the legislature. Would the community have less interest in the former than in the latter? If they would have only as great an interest, then the question is answered, and the difficulty

is solved; for the character of a work must depend upon its nature and not its nature upon the name which is given to it. It is supposed that a good deal of difficulty and uncertainty will be the consequence of this construction. But he who has to deal with the affairs of men, has necessarily some difficulty to encounter. Human interests are not like mathematical abstractions. If they were, there would be no opportunity for the display of prudence, judgment and discretion, nor for the exercise of distributive justice in its various forms. There does not, however, appear to be much room for uncertainty in this case. Here is a canal eighty miles in length, connecting the Ohio with the Pennsylvania canal. It is, 114] in reality, a branch of the former. Suppose *the original design had been to connect our great canal with the Pennsylvania canal, and that afterward the canal from the lake had been cut so as to intersect it, then the Pennsylvania and Ohio canal would have been called the principal work, and the other only an appendage to it. But the time when these two improvements were undertaken, can not make any difference in the character of public utility which belongs to them. So that if it is the nature of an undertaking which is alone entitled to give a name to it, there is neither difficulty nor uncertainty in the application of the rule. It is a consideration of great importance, too, that this canal is declared to be a public highway. It is, indeed, one which is decisive of the matter.

The constitution declares that private property may be appropriated to the public use, provided a compensation is made to the owner. This right to take private property is called, by writers on public law, the eminent domain of a state, and there is a great difference of opinion among them upon the question, whether the state is bound to make compensation. The clause in our constitution was inserted for the purpose of settling these doubts, and not as has been generally supposed, for the purpose of rendering the compensation a condition precedent. It is intended, as a public declaration in answer to the opinions of some European writers on the subject, that the owner *is entitled* to compensation, and was not intended to convey the idea that he must be paid beforehand. In McGowen *v.* Starke, 1 Nott & McCord, 387, the Supreme Court of South Carolina have decided that the state is not bound to make compensation in such a case, and this is in consequence of their constitution containing no provision on the subject. It may

be asked, what security is there that compensation will be made, unless it is made before the property is taken. Precisely that degree of security which exists in a multitude of other instances of infinitely greater moment, in which the citizen reposes a voluntary and unlimited confidence in the good faith of the state. Not to mention the case of the public creditors, who are never sure that they will be reimbursed until payment is actually made; the people are dependent from year to year on the legislature for the enactment of laws which are intended to answer their most pressing wants. And if any selfishness is to be suspected on the occasion, there is less reason to apprehend its existence in *this case, because the state does not make compensation out [115 of its own funds in the first instance, but compels it to be made by the company. It is of infinite importance that the citizens of the state should not consider themselves as merely isolated individuals, having no bond of connection with the common weal. They should consider themselves as united together for the advancement of the interest and happiness of the whole community, and not be disposed to repine at every little inconvenience which their patriotism may occasion them.

The charter of the Pennsylvania and Ohio canal contains very ample provision for the assessment of damages to the plaintiff. Section 9 declares that "whenever the owner of property and the company can not agree as to the amount and can not also agree on some person or persons to appraise the same, that then the legislature shall appoint commissioners for that purpose." So that the act not only authorizes the appointment of a tribunal, in the selection of which the party has an immediate participation, but on failing to make the appointment, the legislature bind themselves to make another. But, in this event, it is the plaintiff himself who must first move in the business. They have given him an election to have the dispute settled by the simple and quiet arbitrament of his own neighbors. And if he does not accept this, he should make application for the appointment of commissioners. How then can he complain that an act has not been done, in the performance of which he is to be chiefly instrumental?

It is immaterial in the shape which these pleadings have now assumed; but I understand that commissioners have actually been appointed. But it is said that the right of trial by jury is violated by the appointment of commissioners. This is an objection which

I have heard repeated ever since my earliest recollection of such matters; and yet it has always been made with that degree of hesitation which denotes that the objector is not altogether sure of the ground on which he stands. It has been constantly made in the progress of every public improvement which has been executed in the United States; and yet every one seemed to feel that although it was striking and plausible, yet that it could not possibly be maintained. The constitution declares that the right of trial by jury shall be inviolate; and the only way in which we can 116] ascertain the true meaning of this clause, is by *making inquiry whether, before the constitution was framed, jury trial was known in such cases in the territory of Ohio. And one of the first acts, which I recollect, is that of December 13, 1799, by which *five* commissioners are authorized to take the land of private individuals, where the public convenience requires that a road should be conducted over it, and declaring that any *three* of the five may agree in the assessment of damages to the owners. This act is of great importance; for here were a people living under a republican form of government with almost every form of civil polity, the same as at present, who afterward frame a constitution for themselves, and who, in effect, declare that jury trial shall be held inviolate as it was before; and yet the intervention of a jury, in such cases, was not only unknown, but, by necessary implication, was absolutely prohibited. If it should be supposed that the term of our territorial government was too short to settle the true import of the term jury trial, the constitution and laws of the other states may afford us some light. But in examining these, it will be found that although the constitutional provision is generally the same as ours, yet that there is the greatest variety in the procedure which the laws authorize. In some of them, three commissioners are appointed; in some five, and in others a greater number. In some the appointment is made by the legislature; in others by the Supreme Court, and in others again by a county court. And this has been the case, notwithstanding some of these states have changed their constitutions in the intermediate time, and have guarded the provision by no additional or explanatory declaration. Perhaps there is no constitutional question which has ever been discussed in this country, which has been so completely settled by contemporaneous construction and universal acquiescence. On what principle is it that juries are dispensed with in the greater

number of our courts, in courts of equity, courts of admiralty, courts martial, and courts of justices of the peace. Magna charta declares that no man shall be deprived of life, liberty, or property, but by the judgment of his peers, *or* the law of the land. Mr. Sullivan (secs. 39, 40) remarks that as juries were unknown in those courts before the great charter, their disuse constituted a part of the law of the land; and, therefore, although that charter was the first great instrument which solemnly guaranteed jury trial to Englishmen, yet it *has never been supposed that [117 that institution constituted a part of the machinery of those courts. And I believe it would be equally difficult in that country to find an instance of the intervention of a jury, in the proper acceptation of the term, in a case like the present. In the Governor and Company, etc. *v.* Meredith, 4 D. & E. 794, which was an action of trespass like the present, the defendants had acted under an act of parliament, authorizing the straightening the streets of a town; the act also appointed commissioners to assess the damage done to individual proprietors. The court were unanimous that the action would not lie. Buller remarked that where the public welfare required it, private property might be taken without making compensation, and that, therefore, on general principles, the action would not lie, but that, at any rate, as commissioners had been provided to estimate and pay the amount of compensation, that that alone was a sufficient answer to the action.

The provision in magna charta, which I have referred to, is transcribed into the ordinance, omitting only the word *life*. And if the last six articles of this instrument are of perpetual obligation, then we have in Ohio the same law and the same course of proceeding as in England, and very nearly the same as in the other states of the Union. If the law were otherwise, no courts would have time sufficient to try the infinite multitude of actions which would arise. It is sometimes said that the utility of any political arrangement is no reason for committing an impropriety; but public utility itself becomes sometimes a great rule of justice. They who make the constitutional objection in this case, do not recollect that if twelve men were selected, they could not be used in the way in which juries ordinarily are. Having no relation to any court of justice in the state, there would be no rule for appointing them in the way that common law juries are chosen, nor any reason for composing them of twelve rather than of any other

number, nor for requiring unanimity in their decisions. And above all, there could be no presiding law tribunal, the conjunction with which is the peculiar and valuable feature of jury trial; so that after all, persons appointed for the purpose of assessing damages would be nothing more than commissioners, as they now are, whatever name we might be pleased to give them. He who will take the trouble to examine our laws, as well before as since 118] the formation of *our constitution, will find that they are uniformly regarded as an appendage to the courts only. No juries are ever mentioned but such as are auxiliary to the administration of justice in some court; and, on the whole, the conclusion to which we are justified in arriving is, that there is nothing repugnant to the constitution in the law under which the defendant defends himself. Objections of this kind should ever be listened to with attention and earnestness. For, although, to decide upon the constitutionality of a law is a duty which no judge should court, yet it is also one from which no judge should shrink.

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HECTOR AND HENRY SMITH v. JOSIAH BARBER ET AL.

In making partition among several tenants in common of several tracts of land, owning in the same proportions, it is regular to assign to any one, or to each one an entire tract.

The prosecution of two writs of partition, at the same time, and for the same object, does not vitiate the regular proceedings in one, upon which partition is made.

A deputy sheriff, summoned for that purpose, by the principal sheriff, may legally act as one of the commissioners of partition, although he afterward make the final return.

THIS is a writ of error brought to reverse a judgment of the court of common pleas of Medina county.

The record shows that at the March term of the court of common pleas, 1824, Richard Pratt filed his petition, setting forth that he was seized as tenant in common in fee simple, with certain other persons to him unknown, of all that part of township No. 2, in range 18, of the Connecticut Western Reserve, and tract num-

ber 4, in range 19, annexed to said township in the original draft and classification of the Connecticut Western Reserve, of which partition had not previously been had; that the proportion of said petitioner in the township and annexation was two hundred and twenty acres, and praying for partition, and to have his share set off to him in severalty.

Satisfactory proof being made that legal notice of the application had been given, the court, after examination of the petitioner's title, granted the prayer of the petition, and appointed Abel Dickinson, Abraham Freese and Isaac Sage, commissioners, and Abraham Freese, surveyor, to make partition, and the case was continued.

At the next succeeding term of the court, in September, 1824, Josiah Barber, John Balls, William Eldridge, and Hezekiah Latimore, filed their petition in said court, setting forth that they also were tenants in common with the said Richard Pratt and others, unknown owners of said township and annexation, *setting [119 forth also their several shares in proportions, and praying, according to the statute in such case made and provided, to be allowed to come in and be made parties to, and join in the petition of the said Richard Pratt. Upon the hearing of this last petition, it was ordered that the prayer thereof be granted, and that partition be made accordingly. And it was further ordered that a writ of partition be issued to the sheriff of the county, requiring him, by the oaths of Abel Dickinson, Abraham Freese, and Isaac Sage, judicious freeholders of the county, to cause partition to be made, etc., and the cause was again continued.

At the next term of the court, to wit, at February term, 1825, it was ordered that Isaac Dimend be appointed in place of Abraham Freese, and that his name be inserted in the writ of partition accordingly.

During the same February term of the court, two writs of partition were issued, bearing date the 28th day of that month, requiring the sheriff to cause partition to be made by the oaths of said freeholders, Dickinson, Sage, and Dimend. These writs were returned on March 2, 1825, and during the said February term of the court. And accompanying said return, and constituting a part thereof, was a report of the freeholders, showing that they had set off to the said Pratt, Barber, Bolles, Eldridge, and Latimore their proportions of said township and annexation in severalty within

the limits of the township. The said several proportions are described by metes and bounds, and protracted on a map or plat accompanying the report. The return shows further that the freeholders were duly sworn. It is signed S. G. Potter, sheriff, by Abel Dickinson, deputy. It appears that Dickinson was summoned by sheriff Potter, and the other two freeholders by Dickinson as deputy sheriff.

Afterward, at the same term, the court having examined the report, accepted and approved the same, ordered that the partition made be final and perpetual, and that the costs should be paid by the petitioners in proportion to the land claimed and aparted to them severally.

The plaintiffs in error are the heirs and representatives of one of the owners of the undivided part of said township and annexation.

The following errors are assigned:

1. It appears that the demandants were tenants in common 120] *with others in township number 2, range 18, and in tract 4, range 19, and their shares or proportions have been set off in one of the tracts of which partition is demanded, and is not shown that the whole of said two tracts were owned by the same proprietors and in the same proportions.
2. Two writs of partition were issued and returned.
3. The sheriff acted as one of the committee.
4. General errors.

HUMPHREY, for plaintiffs in error.

OTIS, for defendants.

Judge HITCHCOCK delivered the opinion of the court:

In order to a correct understanding and correct decision of this case, it is necessary that we should have reference to the manner in which lands in the Connecticut Reserve were originally partitioned or divided among the original proprietors or purchasers from the State of Connecticut. This tract of country containing three millions of acres was sold by the state of Connecticut to a company of individuals denominated the Connecticut Land Company, with the exception of five hundred thousand acres, now constituting the county of Huron. It was conveyed to three in-

dividuals in trust to be by them conveyed in severalty to the several members of the company in proportion to their respective interests, so soon as the particular lands to which they were entitled, should be ascertained. For the purposes of partition and division, the whole country was surveyed into townships of five miles square. A number of these townships were again subdivided into smaller tracts, and were usually denominated equalizing townships. Where an entire township was not of average value, one of these smaller tracts was classified with it and called an annexation. In the final division the owner of the township owned the annexation; and if there were different proprietors, as was often the case, they owned the same proportion in the annexation as in the township. It seems that tract number 4, in range 19, was classified with or annexed to township number 2, in range 18, and that to this township there were several owners or proprietors. Of course these several proprietors must have owned in tract number 4, in the same proportion that they did in the township.

*In considering the first error assigned, the question which [121 first presents itself for consideration is, whether in proceedings for partition, where there are different tracts of land owned by two or more proprietors, the proportion of one of those proprietors can be set off in one of the tracts thus owned; or whether each one of the proprietors shall be compelled to take a proportion of each and every tract. This question, however, is fully settled by the statute. These proceedings were had under the "act to provide for the partition of real estate," passed February 16, 1820. Chase's Stat. 1162. In section 4 of this act it is provided, that "when partition of more than one tract is demanded in the petition, the freeholders appointed to make partition shall set off to each of the petitioners his proper proportion in each of the several tracts of which partition is demanded, unless the several tracts, of which partition is demanded, shall be owned by the same proprietors, and in the same proportions in each tract; in which case the whole share of any proprietor in and to all the several tracts may be set off to such proprietor in any one or more of said tracts, if, in the opinion of said freeholders, such partition will be more advantageous to the proprietors generally than to set off to each proprietor his proportion in each of the several tracts." And this provision of the statute is in accordance with

the common law. "If two mesnes descend to two parceners, and one mesne is worth twenty shillings per annum and the other ten shillings per annum, in this case partition may be made between them in this manner, to wit: the one parcener to have the one mesne and the other parcener the other mesne; and she which hath the mesne worth twenty shillings per annum, and her heirs, shall pay a yearly rent of five shillings, issuing out of the same mesne, to the other parcener and her heirs forever, because each should have equality in value." Lit. Tenures, 251. It is said, however, that it does not appear affirmatively in this case that the two tracts were both owned by the same proprietors and in the same proportions. True, it does not so appear very explicitly, nor does the contrary appear. We know, however, as a matter of fact, from the manner in which the Connecticut Reserve was partitioned among the original proprietors, that this township and annexation must have been owned originally by the same proprietors and in the same proportions; and the presumption is that 122] the same state of things exists. Further, *we are bound to suppose that the court of common pleas would not have confirmed this partition until satisfied by competent proof that both tracts were owned by the same proprietors and in the same proportions. To justify this court in reversing a judgment of the court of common pleas, it is not sufficient to show that by possibility there may have been an error. The error itself, if, as in this case, an error in law, must be apparent upon the face of the record.

The second error assigned is that there were two writs of partition. This was unnecessary, and is perhaps an irregularity; but still it makes no difference in the final result. The petitioners have obtained their several proportions of land precisely the same, if not in the same manner they would have done had there been but one writ of partition. Besides, admitting that it were erroneous, what injury have the present planitiffs sustained thereby? Are they in any worse situation than they would have been had the same lands been set off under one writ? We do not see that they are. As a general rule, no one can complain of an error in a record or judgment except he who has been injured thereby. We do not suppose, however, that in this there is anything erroneous.

The third error assigned is that the sheriff was one of the committee. This assignment is not supported by the record. It does

appear, however, that Abel Dickinson, one of the freeholders appointed by the court to make partition at the March term, 1824, did, in this particular case, act as deputy sheriff, when the partition was actually made, in March, 1825. There is nothing in the law to prevent a deputy sheriff from being appointed, and even acting as one of three freeholders to make partition of real estate. Even should the sheriff himself be one of the number, I should not feel disposed to reverse the proceedings on that account. There would seem, it is true, to be some impropriety in such course of proceedings, as the writ is directed to him. The only duty, however, which he has to perform is to summons or notify the freeholders, see that they are sworn, and make return of the process. The partition itself is made by the freeholders. In this case the sheriff has returned that he summoned Dickinson himself, and that he summoned the other freeholders, by Dickinson, his deputy, and the general return is signed Samuel G. Potter, sheriff, by Abel Dickinson, deputy. In this we see no error.

*Upon a careful examination of the record in this case we [123 have not been able to discover any error, the proceedings and orders of the court of common pleas will therefore be affirmed with costs.

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SAMUEL GRINDLE, BY HIS NEXT FRIEND, GEORGE W. GRINDLE, *v.* LEONARD RUSH AND RANDOLPH R. GREENE.

In an action against surgeons for misconduct in setting a fractured bone, an allegation in the declaration that the defendants promised to perfect a cure, can only be sustained by positive proof of an express promise. The law does not raise, by implication, such an undertaking.

THIS cause was adjourned from Greene county.

ODLIN and SMITH, for the plaintiff:

A. HARLAN, for the defendants.

Judge WOOD stated the case, and delivered the opinion of the court:

In this case the plaintiff, by his *prochain ami*, declares against

the defendants as physicians and surgeons, and sets out as an inducement to the action an injury and fracture of his leg, and that he retained the defendants, partners in their profession, carefully and skillfully to set the broken bone of his leg, and to manage, take care of, and cure the same, for a certain hire or reward, in a careful, skillful, and proper manner; and the said Rush and Greene being so employed, upon their promise and undertaking, to cure and manage said leg in a skillful and proper manner, did, as surgeons and physicians, enter upon and commence the business and undertaking of managing and *curing* said leg in a skillful and proper manner; and avers that although they undertook to set and *cure* said leg in a skillful, careful, and proper manner, yet in so doing the defendants so badly, carelessly, and negligently managed and conducted the said leg, in setting the said broken bone, and in binding up the said leg, that by reason of the improper treatment, negligence, carelessness, and malpractice of the defendants, the plaintiff lost his leg by amputation, etc.

The second count sets out a promise to *cure* the leg, and avers a breach, as in the first count, and loss of the limb by amputation, *per quod*, he, the plaintiff, sustained damages to the amount of ten thousand dollars.

124] *To this declaration the defendants plead not guilty, and the cause was submitted to the jury on the last circuit, who found a verdict for the plaintiff.

The counsel for the defendants then moved the court for a new trial. First, because the verdict was against the evidence; and second, because the defendants' counsel moved the court to charge the jury that they must be satisfied, before they could find a verdict for the plaintiff, that there was a contract and special promise made by the defendants to attend upon and cure the leg of the plaintiff, and that the declaration was not sustained by proving that the defendants were called on as physicians and surgeons to visit the plaintiff in the ordinary way, which instruction the court refused to give, but charged the jury that the declaration was sustained by proving that the defendants held themselves out to the world as physicians and surgeons, and that they called and attended the plaintiff as such, and that no promise to cure the leg need be proven. This motion for a new trial is reserved for decision here.

The first point made by the motion may be disposed of at once.

The judges who tried the cause are fully impressed with the belief that the verdict is sustained by the evidence given on the trial. The remaining point is, perhaps, more difficult, and although we have been able to unite our minds, our opinion may not be in unison with the impressions of a respectable portion of the bar.

The undertaking in each count of the declaration is laid as an absolute undertaking and promise to set the bone and cure the leg! Does the law imply any such contract? This point was decided in the case of Hardin *v.* Matthews, in Geauga county, several years since, in the negative, and the plaintiff *nonsuited.* It was afterward so decided in Bliss *v.* Long, in Cuyahoga county. Hardin *v.* Matthews was a case of *tinea capita*, and Bliss *v.* Long a case of *obstetrics.* In the first the declaration charged an absolute undertaking to *cure*, and in the last to deliver; and the court were of the opinion that the law implied no such undertaking, and as no such *express* promise could be proved, the plaintiff could not recover. In the case of Gallagher and Wife *v.* Thompson, Sup. C. 466, the declaration, among other things, averred a promise by the defendant, who was a physician and surgeon, to *set* and *cure Mrs. Gallagher's leg.* Evidence was introduced to prove the surgeon's retainer, in the usual way, *and his at- [125 tendance, that the leg was not cured, but was rendered nearly useless. A motion was made by the defendant for a *nonsuit*, because there was no evidence of an express promise to cure, and the law did not imply such promise, and the motion was sustained. So far as we can learn, then, the decisions have been uniform on the circuit whenever the question has been presented. If a lawyer is retained, there is an implied obligation to bring to his client's aid integrity and ordinary judgment and skill, but not that he shall conduct his client's cause to a successful issue.

The surgeon engages the ordinary skill of the profession in reducing a fractured bone, and diligence and care in his subsequent treatment, and to use his exertion and endeavor to cure, but a cure *itself* is frequently beyond his physical power. It depends not on him. The accoucheur engages the skill of *his* profession, and that he will endeavor safely to deliver, but there is no positive obligation to produce this result. The event is in the hands of Him who giveth life, and not within the physical control of the most skillful of the profession. On the whole, we are of

the opinion the court *erred* in not giving to the jury the instruction sought, *that there should have been evidence of an express undertaking to cure* before the jury could legally have found for the plaintiff, as the the law raised no such *absolute* undertaking. Motion for a new trial granted, costs to abide the event. Plaintiff leave to amend his declaration in ninety days, and to pay all costs since filed, and every thirty days thereafter a rule day.

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LINUS BASCOM *v.* CLARISSA BASCOM.

Bill of review does not lie on a decree, in a petition for divorce.

THIS case was adjourned from the county of Darke. It was a petition in the nature of a bill of review, the object being to reform a decree previously pronounced between the parties upon a petition for alimony and separation. Wright, 632. The original decree gave the wife seventy-five dollars per annum alimony, and assigned to her the custody of an infant child, the issue of the marriage. The petition for review alleged that the cruelty charged in the original petition was not sustained by proof, and that the 126] allowance for *alimony was excessive. A demurrer to this review was interposed, upon which the case was adjourned.

J. H. CRANE, for petitioner.

MCNUTT, for defendant.

Judge LANE delivered the opinion of the court:

The statute of March 1, 1834 (vol. xxxi, 38) declares that all proceedings under the acts concerning marriages and divorces shall be as in chancery. Under this law it is claimed that all the incidents of a suit in chancery attach to these proceedings, and among others the right of review.

It seems plain to us that such could not have been the intention of the legislature. Where a divorce is granted, upon which one of the parties contracts new relations, and a third party acquires rights, it can not be that a process could be had to reverse a de-

cree, the consequence of which would be a severance of all those new relations. Such anomalous mischief can not be engrafted on the practice of our courts, except by clear and explicit legislative enactment. That, we feel confident, can never take place.

But the different modes of proof between suits in chancery and petitions for divorce show that a bill of review is inapplicable. The former, where all the testimony is in writing, can be presented to the same or to a different tribunal in the same light, and with the same advantages of judgment, as at first. The latter depending more or less upon oral testimony given at the hearing, can not possibly preserve its original aspect upon a second hearing. All the reasons that render a decision upon facts by a jury conclusive between the parties, unite in requiring that the decision of a court, upon facts, on the hearing of a petition for divorce, should be final, and stand beyond the reach of judicial revision. The demurrer is sustained.

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*Joshua Woods v. Beverly McGee. [127

Where a part of an undivided lot of property is sold, and an order given for its delivery, there must be some act of selection under the order, before the right of property is changed.

This was an action of trover for three hundred barrels of flour, originally the property of Henry Swearingen. The plaintiff produced an order from Henry Swearingen, on the defendant, who was his warehouse-man, directing him to deliver six hundred barrels of superfine flour, of his brand, to Levi Hutton. On the back of this order was an assignment, by Hutton to James Gordon and Eli Sidwell, of all his interest; also an assignment by Gordon to Joshua Woods, the plaintiff. The order was dated April 23, 1835. The assignment by Hutton, was of the same date, and the assignment by Gordon was May 1, 1836. On the back of the same order is a receipt by John Quail, acknowledging to have received three hundred barrels of flour, on account of Joshua Woods, dated May 21, 1835. Also, a receipt of the same date by Eli Sidwell, in which he acknowledges the receipt, on his own account, of three hundred barrels of flour of Beverly McGee, on the within order. And it

was for this last three hundred barrels that the action was brought. It was proved that James Gordon, after he had sold his proportion, was authorized by Sidwell to sell his part also, and that he did sell to the plaintiff, in conformity with the instructions of Sidwell. But there was no evidence that this sale was ever communicated to McGee, the defendant.

It was proved that at the time Swearingen drew the order, he had flour in McGee's possession which would satisfy the description in the order, varying in value from twenty-five to fifty cents a barrel, and that he had fifteen hundred barrels altogether there.

The receipt signed by Sidwell, bears date before the suit was brought, but Swearingen testified that it could not have been written until afterward; that he had the order in his possession on May 21st, and kept it two or three days, when he gave it to McGee, who, a week or two after that, returned it to him with the indorsement upon it. A nonsuit was moved for, and granted, in the county where the cause was tried, and a motion was then made to open it, and for a new trial, which was adjourned, to be decided in bank.

The cause was argued by COLLIER and STANTON, for the plaintiff, and by LOOMIS, METCALF, and SUTHERLAND, for the defendant.

128] *But as the case finally turned upon a single point, it is unnecessary to insert the arguments.

Judge GRIMKE delivered the opinion of the court:

The question is, whether there has been a sufficient designation of this flour to authorize trover to be brought for it. Some of the English decisions teach a doctrine which is very latitudinarian, while others, and those the most recent, adhere to the settled principle that where a part of an undivided mass of property is sold, it is necessary that some further act should be done, specifying and identifying the part sold, before the action of trover will lie. In Whitehouse v. Frost, 12 East. 614, where a man having forty tons of oil in one cistern, sold ten tons to B., and received the price, and B. sold the same to C., and took his acceptance upon it, but no actual delivery was made of the ten tons, which continued mixed with the rest in A.'s cistern; it was held, that as between B. and C., the subvendee, the delivery was complete, and that trover would lie. Jackson v. Anderson, 4 Taunt. 24, was decided the year after, and it was there held, that trover might be maintained for nineteen hundred and sixty-nine dollars in a keg containing forty-seven

hundred dollars. No separation was made of the parcel claimed by the plaintiff, but the defendant had sold and converted the whole keg; and on this ground Mansfield, C. J., placed the right of the plaintiff to recover. The next in order, is the case of Austin *v.* Craven, 4 Taunt., where trover was brought for fifty hogsheads of sugar, and it was decided that it would not lie, because there was no specific quantity of loaves *in esse*, and so no identification of the part sold. The case of the oil is noticed with evident disapprobation. White *v.* Wilks, 5 Taunt. 176, presented the same state of facts as Whitehouse *v.* Frost. It was a sale of twenty tons of oil, out of a much larger quantity contained in cisterns, and it was held that trover would not lie. The determination in Austin *v.* Craven is ratified, and that in Whitehouse *v.* Frost is directly overruled. Shepley *v.* Davis, 5 Taunt. 616, was a sale of ten tons of hemp, part of a larger quantity. It was held, that until the part sold was weighed, the sale was incomplete. Busk *v.* Davis, 2 M. & S. 397, was a sale of ten out of eighteen tons of flax. It was held, that not being weighed and the part sold ascertained, that there was not a sufficient identification of this, to authorize *trover to be brought. These are the leading cases in Eng- [129 land, and it is easy to see that the weight of authority is against the action. The case of Pleasants *v.* Pendleton, 6 Rand. 473, is, however, a very strong case the other way. But it is impossible to hide from oneself, that the fact of the small difference between one hundred and twenty-three barrels, the whole quantity, and one hundred and nineteen barrels, the number sold, may have gone a great way to influence the judgment. It was a hard case, and hard cases always make shipwreck of principles. It is impossible to answer the difficult inquiry. If a part only of the flour had been burnt, in that case, on whom would the loss have fallen? If A., being the owner of two thousand barrels of flour, sells one thousand to B., but without anything being done to ascertain the identity and individuality of the part sold, and one thousand barrels are consumed by fire, what is there to determine that that one thousand are the property of the vendee, and that he shall bear the loss? Until this question can be answered, we must adhere to the later English cases; or rather we must adhere to principle, which, looking to every consequence which may arise from any given combination of circumstances, establishes a rule which shall be liable to as little fluctuation as possible. Motion overruled.

IN THE MATTER OF EBENEZER PRENTISS, PETITION FOR PARTITION.

Where one tenant in common has made separate conveyances of the entire right, in various parcels of the land held in common, so that each purchaser's title and possession is separate and distinct, the other tenant in common can not sustain a joint suit for partition against such purchasers, but must bring a separate suit against each.

IN error from Huron county.

The record in the case shows that, at the November term of the court of common pleas of Huron county, 1833, Ebenezer Prentiss, preferred his petition in said court, representing that he was seized in fee simple of one-third part of all lands granted by the state of Connecticut to one Abigail Elliot, a sufferer by the depredations of the enemy, in the war of the revolution. That he derives title from one Anna Larouche by deed, the said Anna being one of the three heirs of the said Abigail Elliot. That the interest of said Abigail Elliot was classified in the township of Berlin, or township No. 5, range 21, of the Connecticut Western Reserve, in the partition made by the Sufferers' Land Company, so-called, to which partition the petitioner assents. That the peti-
130] tioner, in virtue of his purchase *of the said one-third of the interest of the said Abigail Elliot, has become tenant in common with the other proprietors of said section to him unknown. That the right of the said Abigail bears the same proportion to the whole section as four hundred and ninety-six pounds thirteen shillings and ten pence does to one thousand three hundred and four pounds six shillings and four pence half penny. The prayer of the petition is, that one-third of the right or interest of the said Abigail Elliot may be set off to the petitioner in severalty.

Legal notice of the pendency of the petition was given, by publication in the Western Intelligencer, a newspaper in general circulation in the county of Huron, and the cause continued from term to term, until the March term of the court, 1835; at which term John O. Miner, Jos. Otis, Jacob Mingus, and nineteen others appeared in court, and were permitted to file answers, in which they denied the right of the petitioner, and claim to hold each one for himself in several parts and portions of said section. And the case was again continued.

At the June term of the court, 1835, the case was submitted to the court upon the petition, answers, exhibits, and an agreed statement of facts which is also made a part of the record. In this statement of facts, it is admitted that Abigail Elliot was the grantee of the State of Connecticut, as stated in the petition; that the petitioner has received a conveyance of one-third of this right from Anna Larouche, who is admitted to be one of the three heirs of the said Abigail Elliot, and that the right of the said Abigail Elliot was located in said section, and that neither the petitioner, nor those under whom he claims, were ever in the State of Ohio until within five years last past. It is further admitted that the right of said Abigail Elliot was sold for taxes assessed by the fire-land company, incorporated by the State of Connecticut, and conveyed in pursuance of such sale on January 29, 1798, by the collector of said taxes, to Frederick Miner, which deed was duly executed and recorded. That the present defendants possess the several parcels of land by them claimed under deeds from the said Frederick Miner, and *that the defendants are the legal owners of that portion of the said Abigail Elliot's right not claimed by the demandant.* That the defendants and those under whom they claim, have had the control of the land since the tax sale in 1798, and have been *in actual possession, making improvements, for the [131 last twenty-five years.

On hearing, the court of common pleas dismissed the petition, because there were many persons in said section claiming to hold distinct parcels of said land in severalty, by virtue of titles derived from Frederick Miner, whose entire right to said section is not disputed except as to one-third part of the share of Abigail Elliot, and the petitioner claims to have an undivided and common interest in the whole section.

To reverse this order of dismissal the writ of error is brought.

The case was elaborately argued by WEBB, for the plaintiff, and BOALL and WORCESTER, for the defendants.

Judge HITCHCOCK delivered the opinion of the court:

It will be seen, by a careful examination of the statement of facts, that there is no controversy but that Frederick Miner and those claiming under him have the legal title to two-thirds of the interest originally granted by the State of Connecticut to Abigail

Elliot. Whether this title was acquired under a sale for taxes or otherwise, it is immaterial to inquire, so long as its legal existence is admitted. The record shows that the section in which this interest was classified, and in which partition is now demanded, has been surveyed into lots containing about one hundred acres each, and that these lots or parts of them have been conveyed by Miner or his grantees to the defendants in severalty. So far as these defendants claim, therefore, they claim not as tenants in common in the whole, but as tenants in severalty of separate and distinct tracts. Now, admitting the right of the petitioner to one-third of the interest originally vested in Abigail Elliot, there can be no doubt that he is tenant in common to the extent of that interest in each and every one of these several tracts or parcels, because to that extent he is tenant in common with the other proprietors of the whole section.

Having an interest in common in the whole section, it is insisted by his counsel that his co-tenants could not convey any part of their interest in a separate tract in the section, so as to vest in the grantee any title to the part so conveyed. This subject was fully considered by the court in the case of Lessee of White *v.* Sayer, 132] 2 Ohio, 110, in which case *it was settled that a tenant in common could convey a part of his undivided estate; and that a deed by a tenant in common, purporting to convey in severalty, is a good conveyance for the grantee's undivided part within its boundaries. The correctness of this principle is recognized in the case of Green's Lessee *v.* Emerick, 6 Ohio, 391. Upon the authority of these two cases we take the law to be settled in Ohio, that a tenant in common can convey a part of his undivided interest in the whole land, or his whole undivided interest in a part of the land. True, the counsel for the plaintiff has commented upon the before-cited cases with considerable warmth, and some little asperity; but his argument has not satisfied the court that those cases were improperly decided. Nor is there anything in the nature of the case now before us to lead to the conclusion that more substantial justice could be done by a different decision.

Such, then, being the law, there is but one question in this case, and that is, whether, under our partition laws, an individual who has an interest in common in several tracts of land with others, who have no common interest with each other in those several tracts, can enforce partition unless by separate proceedings against

those who, together with him, own those separate tracts. For instance, A. is tenant in common with B. in one section of land, and with C. with another, can he join the two together in one petition? It seems to the court clearly that he could not, and for the reason that he is joining together in the same suit those who have no common interest. In order to sustain the proceedings the petitioner must have a common interest, and those of whom partition is demanded must have a common interest in all the lands sought to be divided.

It follows that the court of common pleas did not err in the judgment complained of.

I am not prepared to say, however, that the petitioner can have no relief except by separate proceedings under our partition laws against all these defendants. It is possible that by bill in chancery, where Miner and all claiming under him were made defendants, he might obtain relief. And that if a sufficient quantity of land to satisfy his claim remains in the hands of Miner, it might be decreed to him. This, however, is a mere suggestion, and upon this point it is not intended to express any opinion.

The judgment of the court of common pleas is affirmed, with costs.

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*WALTER BOGAN *v.* HENRY STOUTENBURGH. [133

Replevin can not be sustained against a plaintiff upon whose suit in attachment a constable has seized goods and retains them, in a case where the writ of attachment issued irregularly.

RESERVED in the county of Delaware.

The declaration was for several bags of wool and other articles of property. The plea *non detinet*, with notice that the property was in the custody of the law.

The facts of the case appear to be these: Stoutenburgh commenced a suit by attachment, before a justice of the peace, without filing the affidavit required by the statute (vol. xxix, 203, sec. 1), against the plaintiff, and delivered the writ to Grigsby, a constable, who, by the direction of Stoutenburgh, and by virtue of the attachment, seized the property in dispute. Bogan, the defend-

ant in the attachment, was in the county when it issued, and then brought this action of replevin against Stoutenburgh and the constable for the property so seized. The cause was submitted to the jury on the last circuit in Delaware county. On the trial, the plaintiff discontinued his action as to Grigsby, and the above facts being proved, the court charged the jury the plaintiff could not recover. The jury, however, found a verdict for the plaintiff, and the case was reserved for decision here, on a motion filed by the defendant for a new trial, because the verdict was against the charge of the court, and the question now is, *did the court err in such instruction?*

POWELL, for the plaintiff:

SWAN and SWEETZER, for the defendant.

Judge WOOD delivered the opinion of the court:

The statute (vol. xxix, 128, sec. 1) provides, "that if any person shall *wrongfully detain* the goods and chattels of another, the owner, or his agent or attorney, may file a precipe containing a description of the property to be replevied," etc., "and shall file an affidavit stating that he has good right to the possession of the goods and chattels described in the precipe, and that they are *wrongfully detained* by the defendant," etc., "the clerk shall issue a writ of replevin."

In England, this action will only lie where there has been a *taking* of the goods and chattels. It will not lie where they have been delivered on a contract, whatever may be the character of any subsequent *detention*. 4 Bing. 299. Under the statute above 134] referred to, it is a wrongful detention, without *regard to the taking of the property, whether such taking is lawful or unlawful, that gives the right of action in Ohio. Indeed, a *tortious taking*, without a subsequent *wrongful detention*, would not support the action. The writ can not issue without the affidavit of the party, or his agent or attorney, of such unlawful detention. The question then arises, in this case, *can a party wrongfully detain the possession of the property, who has not the possession, either actual or constructive?* Without such possession, there is no power to deliver the property, and, consequently, no legal liability could accrue from a non-delivery. What possession had this defendant,

the plaintiff in the attachment? If the attachment issued without affidavit, the plaintiff, especially if he directed the seizure of the property, would be liable in trespass, because he was bound to see that all his own previous steps were legal; but so far as the constable was concerned, his attachment was a good justification for him. He was not under obligation to ascertain whether an affidavit had or had not been filed. He must perform the duty his precept requires, when no want of jurisdiction appears on its face. The constable, then, having seized the property, it is not in the possession of the plaintiff in the attachment. The constable must cause an inventory and an appraisement to be made, and he holds the property not for the plaintiff in the attachment *alone*, but for the benefit of *all*, who shall file in and prove their claims, and the justice is required to make a *pro rata* distribution of the property; and the claims of *other* creditors, filed under the attachment, are not affected by a discontinuance of the original suit. 29 Stat. 208, secs. 18, 19. When the property is once taken by the constable, it is very clear the plaintiff has no power nor control over it. He can not deliver it. It is not wrongfully detained by him, but is in the custody of the law. The court did not err then, in our opinion, in their charge to the jury; and as the verdict is expressly against the instructions given by the court, a new trial is granted with costs to abide the event of the suit

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*Lessee of Bryant, Thornhill, and others v. Alexander McCandless. [135

Dedications of land for public or charitable uses are good without a donee to take title, and in such cases, a trustee may be appointed by the legislature.

This was a suit in ejectment in Licking county, in which a verdict for the plaintiff was taken, subject to the opinion of the court, upon the following proved facts:

In 1804, one hundred and nine persons, residing in Connecticut, associated themselves together under the name of the *New England Licking Land Company*, and purchased a tract of the United

States military land, lying in Licking county, to be occupied and partitioned after the rules prescribed in the articles of association. In 1806, partition was made among them by deed, signed by the members of the company, in which sundry tracts of land are appropriated to public objects. Among these dedicated lands, the tract in controversy is described as follows: "Fifty acres from the southeast corner of section 2, township 4, range 13, which" (with others) "are given by said proprietors, to be a perpetual fund for the support of the ministration of the gospel on the premises of the company, the avails to be equally divided among the ecclesiastical societies thereon, in proportion to their ratios of taxes, which is the only use for which said land is designed by said donors." No trustee was created by this deed. In 1834, the plaintiffs, by an act of the legislature of this state, 32 Ohio L. L. 223, are appointed trustees "to take charge" of these lands, and are authorized, after giving bonds for the faithful discharge of their duties, "to take possession and rent or sell it," for the use of the inhabitants.

In January, 1835, forty-six persons, members or heirs of members of that association, in which after reciting the appropriation, the want of trustees, and the act of the legislature appointing the plaintiffs, they convey to them all their right in the land for the purpose of carrying into effect the original use, with power to rent or sell for that purpose.

The defendants show no title. The plaintiffs gave no bond as required in the act, until since the commencement of this suit. They are entitled to judgment, if these facts show they hold the legal title.

THRALL, for plaintiff.

136] *Judge LANE delivered the opinion of the court:

It is the received and settled law that a dedication for public, pious, or charitable uses requires no donee to give it effect. 6 Ohio, 308; 7 Ohio, 221. It is an equally well-settled principle in chancery, that a trust shall never fail for want of a trustee, but that the necessary appointment may be made by the court. 7 Ohio, 221.

Since then, the original use is a good one; since a court of chancery may appoint a trustee, if necessary, no objection presents

itself to the exercise of the same power by the legislature, in a proper case to secure the object to which the land was devoted, especially when the title is questioned by a stranger.

It is objected that the trustees acquired no authority until the requisite bonds were given. We think it not necessary to decide this question, since if the act had not passed the legal estate to the trustees, the fee remained in the donors and their heirs subject to the trust, and has been conveyed by a part of them by deed to these plaintiffs to attain the ends contemplated in the statute, by which they have received a sufficient legal estate in at least a part of the premises, to recover possession against a trespasser.

Judgment for plaintiff on the verdict.

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LESSEE OF W. A. ADAMS AND OTHERS v. W. TURNER.

It is error if a person owning exclusive title to lands unite with himself, in a joint demise in ejectment, persons having no title.

THIS case was submitted to the court without argument. There was but a single point, which is fully stated in the opinion of the court.

GODDARD, for the plaintiff.

STILLWELL, for the defendant.

Judge GRIMKE delivered the opinion of the court:

This is an action of ejectment. The declaration contains one count, which is on a joint demise from W. A. Adams and four others. It is admitted that the deed for the land in controversy was made to Adams alone, and that the plaintiff can show no title in any of the other lessors. It is supposed that *this mode [137 of declaring is authorized by section 54 of the judiciary act. That section declares, that "in all actions of ejectment, the plaintiff shall have the same benefit from a joint demise that he could from several demises, and separate demises shall only be laid in the names of tenants in common." A real difficulty had before been felt with

regard to the form of the demise, where the lessors of the plaintiff were tenants in common. At common law, coparceners and joint tenants were obliged to lay a joint demise, while tenants in common were forbidden to lay any other than separate demises. It is perhaps difficult to give a reason which shall be perfectly satisfactory to the mind, why such a distinction was originally made, since the same objection, to wit, that the estates of tenants in common are several and distinct, and that there is no privity between them, 2 Wils. 232, would seem to be equally fatal *to their uniting in one action* on separate demises. But, with the exception of one solitary decision in New York, such has been the established law from time immemorial. However numerous, then, may have been the tenants in common, they must, before this act was passed, have counted on separate demises. And it was to remedy this defect, to give simplicity to the form of declaring, and to release the pleadings from all unnecessary prolixity, that section 54 of the act was inserted. Its language is by no means as clear and precise as could be desired; but its true intention can not be mistaken. The plaintiff, however, would have us go much further than this. He insists that although these lessors have no species of joint interest whatever, they may unite in a joint demise; in other words, that although William A. Adams alone possesses title, he may arbitrarily select as many persons as he please, and combine them in a joint demise with himself. If this may be done, it would be a very remarkable departure from principles of law the most firmly established without, at the same time, possessing the merit of remedying any defect or inconvenience of which I am aware. Although the demise is a fiction, yet the title of him who pretends to make it is no fiction. S. Adams, 186, n. 2. The view which the plaintiff takes proves even too much; it would go to *abolish* separate demises where the titles were distinct, and where, undeniably, this was always the proper form of declaring. When the statute declares, then, that "the same advantage shall be had from a joint, as 138] from separate demises," it means to say that *as tenancy in common was the only species of joint interest in which separate demises *must* be laid, that hereafter a joint demise should be equally proper. And when it declares that "separate demises shall only be laid in the names of tenants in common," it means to say that tenancy in common is the only species of *joint interest* in which such may be the form of declaring. By giving this construction

to the law, we give it, in reality, the only sensible interpretation of which it is capable, because the remedy is thus made to operate upon the only pre-existing inconvenience which could be complained of. Judgment for the defendant.

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ANTHONY AND WILLIAM EWING *v.* JOHN HOLLISTER, ADMINISTRATOR OF SAMUEL EWING, DECEASED.

The proceedings in the court of common pleas, by executor or administrator, to subject decedent's lands to sale for the payment of debts, may be reviewed in the Supreme Court on *certiorari*.

In proceedings to sell decedent's real estate, by executor or administrator, persons in interest, though not named in the petition, if they enter an appearance, are properly parties on the record.

In proceedings to sell decedents' real estate, by executors or administrators, it is sufficient if infant heirs appear by their general guardian.

CERTIORARI from the county of Wood.

At the October term of the court of common pleas of the county of Wood, 1825, John Hollister, administrator of Samuel Ewing, deceased, preferred his petition to said court, setting forth that the personal goods and chattels of the intestate were not sufficient to pay the debts due from the estate, and praying for an order of the court for the sale of certain lands of which the said Samuel died seized. Samuel A. Ewing and John A. Ewing, infant sons and heirs of the intestate, were made defendants, and the petition was continued until the next November term of the court. At the last-mentioned term a citation was ordered to be issued to the said Samuel A. and John A. Thomas Powell was appointed guardian *ad litem*, and the cause again continued.

On February 23, 1826, a citation was accordingly issued, and subsequently served on Paine C. Parker, guardian of the said infant defendants, and at the April term of the court, in the same year, Hiram P. Barlow, guardian of Anthony Ewing and William H. Ewing, infants, and said to be heirs of the said Samuel Ewing, deceased, appeared in court and acknowledged service of notice of the pendency of said petition. The court upon examination

of the accounts of the administrator, found the estate to be altogether insolvent, and ordered the land described in the petition to be offered for sale, in pursuance of the statute in such case made and provided. It was sold accordingly.

139] *To reverse this order of sale, this writ of *certiorari* is prosecuted; and the error assigned and relied upon is, that the said Anthony Ewing and Wm. H. Ewing are the heirs at law of the said Samuel Ewing, deceased, and were not made parties to the petition filed by the administrator for the sale of real estate.

COFFINBURY and SPINK, for the plaintiffs in *certiorari*, insisted:

That the plaintiffs in *certiorari* should have been made defendants in the petition. That such was the provision of the statute, and should be literally complied with, as the effect of the proceeding was to divest heirs of property descended to them from their ancestor.

They further insisted, that it was not sufficient that the guardian of the heirs should appear before the court and acknowledge notice. He has no right to defend for his ward in any case, unless appointed guardian *ad litem*. The proceeding is in the nature of a chancery proceeding, and the same notice should be given; that is, notice to the infants themselves.

They cited 3 Ohio, 364; 1 How. Ch. Pr. 73, 104; 3 Bibb, 525; 3 Johns. 368; Cooper's Equity, 108, 324; 2 Johns. 192; 4 Bibb, 96; 1 Marsh. 474; 2 Marsh. 158, 235.

WILCOX and ANDREWS, for the defendants:

Proceedings for the sale of land by an administrator, for the payment of debts, are of a probate nature, and under the constitution and laws of Ohio are within the exclusive jurisdiction of the court of common pleas, and, of course, such proceeding can not be reviewed in this court by appeal, *certiorari*, or writ of error. Constitution of Ohio, art. 3, secs. 2, 5; 29 Ohio L. 56; 6 Ohio, 500; 4 Burr. 2532; Tidd's Pr. 330, 333; 1 Ld. Raym. 580.

But if such proceedings can be reviewed by this court, it should be done by writ of error rather than *certiorari*. *Certiorari* is the remedy in those cases in which error will not lie. Wilcox's Forms and Practice, 243; 1 Ld. Raym. 469, 580.

A writ of *certiorari* is a matter of discretion with the court, and ought not to be allowed after great lapse of time, as in the

*present instance, after a lapse of ten years. 2 Douglas, [140 749; 2 Term, 89; 4 Burr. 2459.

The error assigned is, "that the said Anthony Ewing and William H. Ewing are the heirs at law of the said Samuel Ewing, deceased, and are not made parties to the petition of the said administrator." If this be so, then the plaintiffs can not sustain this writ, for none but *parties or privies* can prosecute error or *certiorari*. If, however, the reverse be true, and the plaintiffs are substantially parties, then the statute has been complied with, and there is no error.

There has been a substantial compliance with the statute, and the notice given was sufficient. It would be sufficient even in a chancery proceeding. The real guardian of these plaintiffs appeared before the court and acknowledged notice, and such acknowledgment is equivalent to a waiver of any further or different notice. 7 Ohio, 202; 2 Madd. Ch. 201; 9 Ves. 357; 1 Chit. Eq. Dig. 483.

Judge HITCHCOCK delivered the opinion of the court:

An exception is taken to the jurisdiction of the court in this case, upon the ground that the proceedings sought to be reversed are of a probate nature, and consequently within the exclusive jurisdiction of the court of common pleas. There is much plausibility, at least, in this argument; but we incline to the opinion, as, since the act of February 11, 1824, defining the duties of executors and administrators, 2 Chase's Stat. 1308, proceedings by administrators for the sale of real estate are somewhat in the nature of adversary suits, that those proceedings may be reviewed in this court, and further, that the proper mode of reviewing them is by *certiorari*. The difference between writs of error and *certiorari* is not well defined in our practice. But so far as there is any general rule upon the subject, the former is the appropriate remedy where the proceedings are according to the course of the common law; the latter, where the proceedings are of a different character. In either case there must have been, however, what is equivalent to a final order or judgment of the inferior tribunal, before the writ can be issued.

It is again insisted by the defendant, that the assignment of error shows that the plaintiffs have no right to prosecute this suit; because that assignment is made upon the hypothesis that the

141] plaintiffs are not parties to the record, and, of course, *are in no way affected by the order complained of. That none but parties or privies can prosecute a writ of error will not be denied. But if I rightly understand the assignment, counsel are mistaken. The error complained of is, not that the plaintiffs are not parties to the *record*, but that they are not parties to the *petition*. Were they not parties to the record, there might be some difficulty in the case, as there is no extrinsic evidence to show that they are the heirs of the intestate, or that they had ever any interest in the land. But it is said that, although their names appear upon the record, yet they were not inserted in the petition, and section 19 of the article above referred to, provides "that when the executor or administrator shall apply to the court under this act, for authority to sell the real estate of their testator or intestate, the application shall be by *petition*, to which the lawful heir, or the person having the next estate of inheritance of the testator or intestate shall be made defendant." Such being the letter of the law, and these plaintiffs being heirs, it is claimed that before they can have been divested of their right, it must have been literally complied with. The objection, to say the least of it, is extremely technical. But where the value of property has increased as rapidly as it has done in the county of Wood within a few years past, and where the spirit of speculation is abroad in the land, a person seized of real estate can not expect to be safe in his title, unless it can be defended against the most trifling technical objection. In such times, the principles of abstract justice are lost sight of, and he who can accumulate the most property, is the most honored, no reference being had to the means by which it was acquired.

Prior to the act of February 11, 1824, proceedings in the court of common pleas, for the sale of intestate lands to pay debts, were wholly *ex parte*. Nothing more was requisite than for the administrator to satisfy the court, after having filed his petition, that such sale was necessary. This was done by producing the inventory and schedule of debts due the estate, and a schedule of debts due from the estate. If the latter overbalanced the former, an order was made for the sale of lands. Since June, 1808, lands in this state have been assets in the hands of administrators and executors, as well as personal estate, for the payment of debts; with this difference, that the personal estate must be first exhausted, and

the *further difference, that lands could not be sold without [142
an order of the court of common pleas. True, upon the death of the ancestor, the lands descend upon the heir, but subject to the debts of that ancestor. As before remarked, previous to the act of February 11, 1824, proceedings to procure an order of sale were *ex parte*. But by section 19 of that act, it is provided that applications for an order of sale shall be by petition, "to which the lawful heir, or the person having the next estate of inheritance of the testator or intestate, shall be made defendant." Chase's Stat. 1311. This quotation, it is believed, constitutes the only material change upon this subject from the pre-existing law. Although the heir is to be made defendant, yet it is not expressly provided that he shall have notice of the intended application, or the filing of the petition. And pursuing the statute *literally*, the interest of the heir could be no better protected than under the previous law. This difficulty is remedied by the act upon the same subject of March 12, 1831, which requires that the same notice shall be given in proceedings for the sale of land by administrators as are given in proceedings in chancery. 29 Ohio L. 237. This latter act, too, requires the widow of the testator or intestate (if there be any), as well as the heirs, to be made defendant. Under the act of 1824, however, I have no doubt that the heir should have notice. To insert his name in the petition merely, without permitting him to know of the proceeding, would be but mockery. It was so unquestionably the intention of the law, that those who were interested in the estate should have an opportunity to show that no necessity existed for the sale of lands, and this intention would have been entirely defeated upon any other supposition than that notice should be given. But as the form of giving this notice was not prescribed in the law itself, it must, of necessity, be done by the practice of the several courts. Such being the case it would not be surprising that the practice should be different in different circuits. But if the practice adopted was such as to afford the heir a fair opportunity to contest the application, it ought to be held sufficient, and we should hold it so, even if, under similar circumstances, we should have adopted one that was different.

Counsel for the plaintiff seem to suppose that a proceeding by an administrator to procure an order of sale, is in the nature of a suit in chancery, and that the same strictness and *techni- [143
cality is required. But it is not so. It is merely a mode pro-

vided by statute to change the lands of the intestate into a fund for the payment of his debts. Nothing is taken from the heir which belongs to him, because the lands descend upon him incumbered with those debts. It is proper, however, that the heir should have an opportunity to contest the application. So far as relates to the infant defendants named in the petition, in the case before the court, the mode adopted of giving notice was by serving a citation on their guardian. It seems to the court that this was sufficient. It was the duty of the guardian to protect the interests of his wards, and notice to him would be more effectual for all beneficial purposes than notice to the infants themselves. In truth, the only effect in giving notice to infants in any case is, that it usually conveys information to their friends, and those who would be disposed to attend to their interests. Further, the obligation of the legal guardian to defend his ward would be much stronger than that of a mere guardian *ad litem*. If the service of a citation upon the guardian would, under the law of 1824, be sufficient notice of the pendency of the petition, surely the appearance of the guardian, and his acknowledgment of notice, must be sufficient. For I take it to be a good general rule, that a defendant may, if he think proper, waive process and appear voluntarily in court.

It is objected, however, that these plaintiffs were not made defendants in the petition. True, they were not, nor were they subsequently made defendants by a formal amendment of the petition. But that which is equivalent was done. They are parties defendant upon the record, made so by the voluntary appearance of one who had the custody of their persons and property, and whose duty it was to attend to their interests. They had a day in court, and the law under which the proceedings were carried on has been substantially complied with. It was so decided by this court in the case of Lessee of Ewing *v.* Higby, 7 Ohio, 198, in which this identical question was raised and discussed. In justice to the court of common pleas by whom the order of sale, which is now sought to be reversed, was made, I am bound to say that peculiar solicitude appears to have been manifested in attending to the interests of all concerned, and in complying with the law; and if these proceedings were to be reversed, it is apprehended that of 144] the numerous sales which have been *made of intestates' lands since the act of 1824, but few could be sustained.

The order of the court of common pleas is affirmed with costs.

SAMUEL B. HARRIS *v.* JOHN CARLISLE AND ANDREW CARLISLE.

Where a respondent in chancery admits an allegation in the bill, which he is called to answer, and alleges other and new matter to avoid the effect of such admission, the proof of such new matter rests upon the respondent who introduces it.

BILL of review, reserved in Ross county.

The original bill was filed in 1824, under the provisions of the act of the 22d January of that year. 2 Chase's Stat. 1278, sec. 10. The bill states that the complainant had recovered a judgment at law against John Carlisle, on which an execution had been issued and returned *nulla bona;* and that Andrew Carlisle was indebted to his co-defendant for moneys received to his use, for goods, wares, and merchandises, and then had in his possession, goods, wares, and merchandises belonging to his co-defendant, which could not be reached at law. The bill charges a fraudulent combination to keep the property and moneys beyond the reach of creditors, and seeks an appropriation of it in payment of the complainant's judgment.

John Carlisle, in his answer, admits the complainant's judgment, execution, and return, as stated in the bill, his inability to pay, and denies all other matters charged. Andrew Carlisle, in his original answer, filed January 4, 1825, denied having any property of his co-defendant in possession. He speaks of a settlement between them on July 3, 1824, at which time he was indebted; but gave his notes to individuals whom his co-defendant was owing for the amount, and states that since that time, John Carlisle had become indebted to him for a balance of one hundred dollars, as by his account rendered. This answer was excepted to, the exception sustained, and an amended answer filed on July 14, 1825. In this amended answer, this defendant states a partnership with M. Woodsides, in the mercantile business, in 1822, and that prior to that partnership, he had received nothing from his co-defendant. That on forming that partnership John Carlisle agreed to pay for a moiety of the goods, but afterward became embarrassed, was unable to do so, and made *him no advances, otherwise than by loan. That [145 during the existence of this firm, it fell in debt to John Carlisle in the amount of one thousand three hundred and fourteen dollars and sixty-five cents. The partnership was dissolved, and this de-

fendant agreed to pay Woodsides for his interest one thousand six hundred and seventy-five dollars twelve and a half cents, and this agreement was so modified that he agreed to pay John Carlisle's debt. That in February, 1823, he commenced business for himself, and exhibit "A," he says, shows the transactions between him and his co-defendant to July 1, 1824. On that day a settlement took place, and a balance was found due his co-defendant of two hundred and seventy dollars, for which he executed his note to one Brown, to whom his co-defendant was indebted, at his request. This answer need be pursued no farther to arrive at the point in controversy. A replication was filed, and several depositions taken; but it is only necessary to refer particularly to those of Moses Dimmitt and William Mann Carlisle.

Dimmitt testifies that John Carlisle furnished Andrew with a large sum of money about the time Andrew was to leave for Philadelphia, in 1823. The amount, he believes, was eleven hundred dollars. A part of this sum, he supposed, was appropriated to pay John Carlisle's debts, but he did not know that such was the fact.

W. M. Carlisle swears that on his return from New Orleans, in 1823, Andrew received of John a sum of money, which he understood to be about eleven hundred dollars. On this evidence, the court of common pleas dismissed the bill. It came by an appeal to the Supreme Court, and was tried on the same evidence at the November term, 1827. The Supreme Court determined the equity of the case was with the defendants as to all matters, except the eleven hundred dollars and *another* item, not now necessary to notice, and referred the case, as to those items, to a master. No report was made, and at the November term, 1828, the defendants filed amended answers, and a new reference was made of the items in dispute. It is to be observed that on exhibit "A," referred to by Andrew Carlisle in his first amended answer, and made a part of it as a statement of the accounts between the defendants, there is neither a debet nor credit of eleven hundred dollars, but a credit, 146] under date of November 1, 1823, of six *hundred and eighty-eight dollars and seventy-five cents, as a balance of cash borrowed.

Andrew Carlisle, in this last amended answer, admits the receipt of the eleven hundred dollars proved by Dimmitt and W. M. Carlisle. He says, explaining more fully the credit of No-

vember 1, by balance of cash borrowed, six hundred and eighty-eight dollars and seventy-five cents, that it is a part of the eleven hundred dollars proved by the witnesses, which he received when going to Philadelphia. That the amount was not entered at the time on book, but on a separate piece of paper; and when he returned, certain amounts he had paid for and advanced to his co-defendant were deducted, and the balance credited, which is the credit on exhibit "A." The amended answer of his co-defendant sustains him in the statement thus made. On this statement of the case, at the November term, 1829, the master commissioner reported in favor of the defendants, and the bill was dismissed on the ground, so far as the eleven hundred dollar item was concerned, that it was accounted for by the last amended answers of the defendants in the payment of John Carlisle's debts, small sums advanced to him, and by the credit on exhibit "A," six hundred and eighty-eight dollars and seventy-five cents. The counsel for the complainant suppose the court erred in dismissing the bill, and seek a review and reversal of that decree.

B. G. LEONARD, for complainant.

R. DOUGLASS and H. H. HUNTER, for the defendants.

Judge WOOD delivered the opinion of the court:

Did the court err, in this case, in receiving the last amended answers of the defendants as sufficient evidence to discharge them from accountability to the complainant for this eleven hundred dollars, and proceeding to render the decree now sought to be reversed? The rule is, that when the answer admits a fact, and is responsive to the bill, the answer must be disproved by the complainant, if he would avoid the effect of such admission; but if it be necessary for the defense to avoid it, and the answer set up new matter, in avoidance, such new matter must be proved, *aliunde*. *Is not this the case before us?* To avoid this item of eleven hundred dollars, proved by two witnesses to be in Andrew Carlisle's hands, in *his third answer he admits it, but says [147 he paid a part of it to and for his co-defendant, and the balance is the credit of November 1, 1823, on exhibit "A," six hundred and eighty-eight dollars and seventy-five cents, which credit this amended answer is more fully to explain.

In Hart *v.* Teneyck, Chancellor Kent refers to a case before Lord Cowper, where creditors filed a bill against an executor for an account of personal estate. The executor answered that the testator left eleven hundred pounds in his hands, and that afterward, on a settlement, he gave his bond for one thousand pounds, and the other one hundred pounds was given him by the testator for his care and trouble. There was no other evidence in the case of the eleven hundred pounds being deposited with the executor. The answer was put in issue, and it was resolved by the court, that when an answer was put in issue, what was confessed and admitted by it need not be proved; but that the defendant must make out, by proof, what was insisted on by way of avoidance. Of this case the chancellor remarks, it is undoubtedly the long and well-established rule in chancery, and that it was determined, in Talbot *v.* Rutledge, that if a man admits, by his answer, that he received sums of money at certain times, and states that he paid away those sums, at other times, in discharge, he must prove his discharge, otherwise it would be to allow a man to swear for himself and be his own witness; and I am satisfied, says he, the rule is perfectly just, and that a contrary doctrine would be pernicious. In Thompson *v.* Lambe, 7 Ves. 587, Lord Eldon said he was clearly of opinion a person charged by his answer, could not by his answer discharge himself, not even on his examination before the master, unless it is in this way: If the answer or examination states that, upon a particular day, he received a sum of money and paid it over, that may discharge him; but if he says, on a particular day he received a sum of money, and upon a subsequent day paid it over, that can not be used in his discharge; for it is a different transaction. There are many authorities to support this rule. 1 Wash. 224; 1 Mum. 373; Green *v.* Hart, 1 Johns. 580. In the court of errors this doctrine is carried to the full extent. Hart charged in his bill that he paid a full and valuable consideration for a note indorsed to him by Green, who, in answer to this charge and the interrogatory founded on it, alleged that part of the consideration for indorsing
148] the note *was usurious. Chancellor Lansing held that the allegation of usury was in avoidance merely, and not sufficient without *other* proof, and such was the opinion of the court.

These cases appear to us to bear a striking analogy to the one before us. They are certainly no stronger for the application of

the rule. In this case Andrew Carlisle is first charged, not by his own admission, but by the testimony of two witnesses, with the receipt of eleven hundred dollars, and it is then only that it is admitted and new matter set up to explain more fully the credit of November 1, 1823, on exhibit "A."

In receiving the answers of the defendants as sufficient evidence to discharge Andrew Carlisle from accountability to the complainant for this sum of eleven hundred dollars, and thereupon dismissing the complainant's bill, we think the court erred, and that the decree of dismissal should be reversed, with costs.

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JOHN FORD *v.* THE COMMISSIONERS OF GEAUGA COUNTY AND AUGUSTUS SKINNER ET AL.

When an execution is levied upon chattels sufficient to pay the debt, and subsequently the goods are restored to the defendant by consent of the plaintiff, the judgment lien on the defendant's land is lost as against a purchaser during the continuance of the levy.

THIS is a bill in chancery brought to review the decree in the case reported in 4 Ohio, 378.

HITCHCOCK, for the plaintiff.

LANE, J., delivered the opinion of the court:

In October, 1816, a judgment was recovered against French and others, by Skinner, in the name of the commissioners of Geauga county. French then owned a tract of land subject to a mortgage to Coit. In October, 1818, a levy was made upon personal property of French, sufficient to discharge the judgment, which remaining unsold in March, 1819, the levy upon it was released by the consent of Skinner and French.

In November, 1818, after the levy and before the release of the property, Ford purchased the land of French, and took a conveyance in fee. In 1828, the judgment never having been satisfied, a new execution was taken out and levied upon the land, upon

149] which Ford brings his bill to enjoin the further *pursuit of their levy, claiming that, by the acts of the parties to the execution, the land is discharged from the lien.

At the former hearing in bank, in January, 1831, two of the three judges concurred in dismissing the bill. Further examinations in the new light in which this case is now placed, have led me to change my opinion as to the correctness of the decree.

When land is purchased from a judgment debtor, the purchaser may require the property of the debtor, or lands subsequently sold by him, to be exhausted in satisfaction of the judgment before his. 5 Johns. Ch. 325. And he may exact from the creditor a due and reasonable pursuit of his remedies. A levy upon personal estate is a satisfaction of the judgment while it subsists, 3 Ohio, 224; 5 Ohio, 173; and the land of the debtor may be lawfully acquired upon this presumption. 5 Ohio, 179. If the levy be set aside for irregularity or casually lost without the negligence or misconduct of the creditor, the lien on the land is revived; for the equities are equal, and the earliest legal right should prevail. 10 Pet. 210. But where a creditor voluntarily surrenders his means of satisfaction to his debtor without the consent of those who have acquired later interests, it is a species of *mala fides* to attempt afterward to subject them to his debt.

Such is the condition of the parties to this suit; Skinner having a valid and sufficient levy, released it to his debtor; it is not right to permit him to disturb those who acquired rights, relying on his diligence and good faith.

Injunction decreed. Judge HITCHCOCK, having been of counsel, did not sit in this case.

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THE TRUSTEES OF SECTION No. 16, IN TOWNSHIP 14, RANGE 17, IN HOCKING COUNTY, *v.* JESSE SPENCER.

An action of covenant can not be sustained for rent against a lessee, in a lease sealed and subscribed only by the lessors, although such lessee has actually entered into possession under the lease.

THIS was action of covenant upon a lease executed under seal by David Funk and two other trustees, etc., to the defendant,

dated May 27, 1816, for a part of section 16. The lease purports to have been made in pursuance of a special act of the legislature, the premises thus leased being at the time of the lease in Fairfield county, but now in Hocking county. The declaration is in the usual form, except that it *does not aver that the defendant [150 sealed the lease. It averred, however, acceptance and enjoyment of the lease by the defendant. Several special pleas were filed, which were demurred to, and the demurrers sustained. The defendant also plead: 1. *Non est factum;* 2. That the grantors of the lease were not, at the time, trustees of the township, and that the plaintiffs are not their successors; on which pleas issue was taken, and a verdict being rendered for the plaintiffs, the case was, by consent of the parties, adjourned to the court in bank, where motions in arrest and a new trial might be heard, and the questions of law be finally disposed of in that tribunal.

DOUGLAS, for the defendant:

No decision, either English or American, can be found where an action of covenant has been maintained upon a deed poll against a defendant who has not sealed the instrument, unless it be founded upon some special custom. The leading cases cited by plaintiffs' counsel are Brett *v.* Cumberland, Cro. Jac. 399, 522. These cases arose upon clauses in the queen's patent, and are no authority for the present action. So by the customs of London and Bristol, an action of covenant may be maintained without a specialty. Com. Dig. tit. London, a. The next authority is Shep. Touch. 177, where Co. Lit. 231, a, and Dyer, 13, are cited. Platt, in his treatise on Covenants, has shown that these cases can not be supported. He shows that on a deed poll mutual covenants can not arise. The case in 2 Halst. 142, is also an authority in point.

HUNTER, for the plaintiff:

The action of covenant, it is true, can generally only be sustained upon a contract under seal, but the rule is by no means without exception that the *defendant* shall have sealed. In personal contracts, it is general, unless by some special custom. And, on the other hand, it would seem to be a general rule, that where the covenants run with the land, the action of covenant will lie, whether the defendant has sealed or not. 5 Co. 16; 1 Wash. C. C. 375. So also covenant lies against the grantee of the king's

patent for rent reserved or for breaches of covenant running with the land. Cro. Ja. 399, 522. So if a feoffment is made to two, and 151] one does not seal, both *are bound by the covenants as much as if both had sealed. Co. Lit. 231; Dyer, 13; Com. Dig., tit. Covenant; 2 Stra. 1089. The declaration avers the acceptance of the lease by the defendant, that acceptance is evidenced by the assignment of the defendant of the lease to Worthington; actual possession was not necessary. Doug. 461, and note.

Judge GRIMKE delivered the opinion of the court:

The question arising in this case is a very important one, and is, I believe, for the first time, presented for decision in this country. It is, whether a person may, by certain acts of his own, such as his acceptance of an interest conveyed by deed, which he never executed, bind himself to perform all the conditions and covenants which it contains, as effectually as if he had in a formal manner sealed and delivered the instrument. The general rule undoubtedly is, that the action of covenant can not be maintained, except against a person who, by himself or some other person authorized by him, has executed a deed under seal. But, although this is the general doctrine, yet it is contended that there are exceptions to it, and that the exceptions are as firmly established as the rule itself. Saunders, in his work on Pleading and Evidence, seems to consider the law as thus established, though he does not undertake to examine the correctness of it. The leading authority which is usually relied on, is in Co. Lit. 231, a, where it is said that if a lease is made to A. and B., by indenture, and A. only execute it, but B. agrees thereto, and enjoys the premises by virtue of the demise, an action may be maintained against both jointly. Mr. Platt, in his very able treatise on the Law of Covenants, page 12, remarks, that the cases in the year books, which are referred to by Coke, do not authorize the position that an action of covenant may be maintained against a person who has not executed the deed, but who has availed himself of some benefit under it; that the two first cases cited, 38 Ed. 3, c. 8, a, and 3 H. 6, c. 26, were not actions of covenant, but of debt, and that the last, 45 E. 3, c. 11, 12, has still less relevancy to the doctrine. Indeed, Coke himself does not say that an action of covenant will lie, but only *an action;* and the reader is left to conjecture, what form of action he really intended. But the doctrine now contended for, has derived fresh importance

from some observations which were made by Abbott, C. J., in the late case of Burnett *v.* Lynch, 5 B. & C. 602; S. C., 8 D. & R. 368. The *action was case and not covenant; but the chief jus- [152 tice, in delivering his opinion, declares that covenant may be sustained "under some very peculiar circumstances, such as those mentioned in Co. Lit. 231, a." Yet it is evident that this is only an extrajudicial opinion, without examination of the cases on which the position rests; and I think it is moreover evident that it is said hesitatingly and reluctantly.

Brett *v.* Cumberland, Cro. Jac. 399, 522, are also relied upon. These decide that covenant lies against the grantee of the king's patent for rent reserved. These cases stand alone; indeed, they are regarded by Blackstone, in his Commentaries, as forming the only exception to the general rule. In Goodwin *v.* Gilbert, 9 Mass. 510, it is held that where land is conveyed by deed poll, and the grantee enters the deed, certain duties being reserved to be performed by him, as no action lies upon the deed, an action of assumption may be maintained against him. The case was argued by very able counsel, Dexter and Jackson on one side, and Otis and Sullivan on the other; and yet no allusion is made to the peculiar doctrine *supposed* to be laid down by Coke, although the defense rested principally upon objections to the form of the action. The doctrine was not noticed in any of the early editions of Chitty's Pleading, but it has lately arrested his attention in consequence of its having been made the subject of a rigid scrutiny and examination; and in the edition of 1833 he seems to consider it as a departure from well-established principles. The doctrine with regard to covenants running with the land has evidently no application. No such covenants can be created or assigned, except by deed. A lessee by deed poll, or writing not under seal, who should be bound to the performance of certain duties relating to the land, could not therefore be sued in covenant, because those duties in order that they should be considered as covenants, must, in addition to their relation to the land, be created by deed. Their relation to the land does not convert them into covenants, but (provided something else is done) only characterizes them as covenants which concern the realty. It would seem sufficient to stop here; for if such a doctrine is unsustained, either on principle or authority, in England, and has never been asserted until now in any of the courts of America, we hold it to be most fit that it should re-

ceive no countenance or sanction, and that the error should be
153] be detected in the very beginning, *rather than the court should be called upon at some future day to reconsider an opinion which was manifestly inconsistent with the most settled principles of law. It becomes unnecessary to examine any other questions made, as this disposes of the case. The plaintiff must therefore submit to a nonsuit.

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HAZLET, ALEXANDER & CO. *v.* JOS. CRITCHFIELD ET AL.

The limitation laws of Ohio are so framed that all actions and causes of action must be governed by the particular act in force at the time the cause of action accrued.

THIS case was submitted to the court in the county of Knox, and reserved for decision in bank.

It is an action of debt. The declaration alleges that the defendants being the stockholders of the Owl Creek Bank of Mount Vernon, on June 8, 1831, in the county of Knox, and carrying on the banking business under the name and association of the Owl Creek Bank of Mount Vernon, were indebted to the said plaintiffs in the sum of eighty dollars, for money lent, and advanced, and deposited in said bank, at the request of the defendants, by means whereof the defendants became liable to pay, etc., but neglected and refused, etc.

To this declaration the defendants pleaded, first, the general issue; second, that the cause of action in the declaration mentioned did not accrue within six years before the commencement of the suit, concluding with a verification.

Issue is joined upon the first plea, and a replication filed to the second, setting forth that the indebtedness of the defendants stated in the declaration, is evidenced by simple contract and not by specialty; and that the cause of action accrued to the plaintiffs before February 25, 1824, and after January 25, 1810.

To this replication there is a general demurrer and joinder.

EWING, HARTER, and CURTIS, for plaintiffs.

GODDARD, CONVERSE, and BREWER, for defendants.

Judge HITCHCOCK delivered the opinion of the court:

The pleadings in this case present this question, "whether an action of debt upon simple contract, the cause of action accruing *before the passage of the limitation law of 1824, is barred, [154 if not commenced within six years from the time the cause of action accrued. By an examination of the limitation acts of January 4, 1804, Chase's Stat. 392, and January 25, 1810, Chase's Stat. 655, it will be seen that the time within which the following actions shall be brought is limited, to wit: Trespass for assault and battery, slander for words spoken, as for libel, false imprisonment, actions upon book account, for forcible entry and detainer, trespass upon real property, trespass, detinue, trover, replevin, actions upon the case, debt for rent, actions of covenant or debt upon specialty, and actions of ejectment. In both acts the limitation is made to operate not upon the cause, but upon the form of action, except so far as relates to actions founded upon book account. Actions of debt upon simple contract, are not enumerated as among those limited; and the court, at an early period, decided upon the circuit, that actions of this description were not within either of these statutes, unless the cause of such action was book account. After the organization of the court in bank, the same was held in the case of Tupper v. Tupper, Ohio, 387.

It is supposed by counsel, however, that this action is barred by the act of February 25, 1824, more than six years having intervened between the passage of that act and the commencement of this suit. This act, among other things, provides that actions upon the case, and debt founded upon specialty, or any agreement in writing, shall be brought within fifteen years; if founded upon any simple contract, not in writing, within six years from the time the cause of action accrued. By this act, that of 1810 is repealed with the following proviso, "that nothing in this act shall be construed to extend any action or cause of action which may have been heretofore barred by any statutes of limitation; but all such actions and causes of action shall be adjudged and decided under the statutes by which they have respectively been barred." Chase's Stat. 1402, 1403. Taking this act by itself, there might be difficulty in the case under consideration, as the pleadings do not show whether the action is founded upon a written contract or otherwise. The form of the declaration is for money, lent, advanced, and deposited; but this is no

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To this declaration the defendants pleaded, first, the general issue; second, that the cause of action in the declaration mentioned did not accrue within six years before the commencement of the suit, concluding with a verification.

Issue is joined upon the first plea, and a replication filed to the second, setting forth that the indebtedness of the defendants stated in the declaration, is evidenced by simple contract and not by specialty; and that the cause of action accrued to the plaintiffs before February 25, 1824, and after January 25, 1810.

To this replication there is a general demurrer and joinder.

EWING, HARTER, and CURTIS, for plaintiffs.

GODDARD, CONVERSE, and BREWER, for defendants.

Judge HITCHCOCK delivered the opinion of the court:

The pleadings in this case present this question, "whether an action of debt upon simple contract, the cause of action accruing *before the passage of the limitation law of 1824, is barred, [154 if not commenced within six years from the time the cause of action accrued. By an examination of the limitation acts of January 4, 1804, Chase's Stat. 392, and January 25, 1810, Chase's Stat. 655, it will be seen that the time within which the following actions shall be brought is limited, to wit: Trespass for assault and battery, slander for words spoken, as for libel, false imprisonment, actions upon book account, for forcible entry and detainer, trespass upon real property, trespass, detinue, trover, replevin, actions upon the case, debt for rent, actions of covenant or debt upon specialty, and actions of ejectment. In both acts the limitation is made to operate not upon the cause, but upon the form of action, except so far as relates to actions founded upon book account. Actions of debt upon simple contract, are not enumerated as among those limited; and the court, at an early period, decided upon the circuit, that actions of this description were not within either of these statutes, unless the cause of such action was book account. After the organization of the court in bank, the same was held in the case of Tupper v. Tupper, Ohio, 387.

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criterion by which to judge of the evidence to be adduced. The declaration might be sustained as well, at least, by written as un-
155] written evidence. If, however, the contract rested in *parol merely, the cause of action would seem to be barred, as six years had transpired after the passage of this act and before the commencement of the suit. But for the purposes of this case, the act of 1824 can not be taken by itself alone. On February 8, 1826, an act supplementary to that of 1824 was passed. Chase's Stat. 1528. The reason of enacting this latter law is stated in a preamble. It was because doubts had arisen, in consequence of the peculiar phraseology of the proviso or saving clause in the act of 1824, whether that act did not suspend the operation of all former acts for the limitation of actions and causes of action, not actually barred by such former acts, prior to February 25, 1824. To remove these doubts, the acts of 1804 and 1810 are expressly revived, so far as relates to all causes of action accruing during their continuance in force, and are to be barred by the operation of those statutes, and no other. In construing the act of 1824, it must be taken in connection with this supplementary law; and being so taken, there can be no difficulty. The intention of the legislature is clear that all actions shall be barred by the limitation law in force at the time the causes of action accrued. It was not the design that the law of 1824 should have a retrospective, but a prospective operation. Not that it should affect causes of action which had already accrued, but those which might thereafter accrue.

Such has been the policy of all the state legislation upon this subject, with perhaps a trifling exception in the act of January 4, 1804. This was the first law upon the subject, after the organization of the state government. In section 1, several actions and causes of action are limited, and lest it should be supposed that existing causes of action might be thereby barred, it is enacted in section 5, "that all causes of action enumerated in this act, which have already accrued, shall only be barred by counting time of limitation given to those actions respectively from the passage of this law." Chase's Stat. 393. In the act of 1810, there is a section providing "that all causes of action enumerated in this act, which accrued before the passage of the act of 1804, shall only be barred by the provisions thereof, as well as those causes of action which have accrued since the passage of the act aforesaid, and before the passage of this law." Chase's Stat. 656. Next comes the act of

1824, with the supplementary law of 1826, which have been already considered, *and then the act of February 18, 1831, which [156 is still in force. The phraseology of the saving clause in this statute is somewhat different from the others, but the effect is the same. It is as follows: "That all causes of action not heretofore barred, which subsisted or accrued during the time those acts were in force, shall be commenced within the times therein limited, and not after; and all such actions shall be barred after the expiration of the several times allowed for their commencement, according to the provisions of said acts respectively, and their amendment." Chase's Stat. 1768. It has been contended that causes of action which were actually barred, are not within this saving clause. But such could never have been the intention of the legislature. It would be the height of absurdity to suppose that they intended to continue those pre-existing statutes in operation, so far as respected causes of action which were not barred, and to repeal them to such as were. It was held differently by this court, in the case of Bigelow *v.* Bigelow, 6 Ohio, 97. And with the construction put upon this part of the statute in that case we are satisfied.

From a careful examination of all the legislation of the state upon this subject, we are led to the conclusion that the laws are so framed that all actions and causes of action must be governed by the limitation law in force at the time the cause of action accrued.

Applying this principle to the cause under consideration, the plaintiffs are entitled to judgment on the demurrer; because when the cause of action accrued, the law of 1810 was in force, and by that law, there was no limitation to the action of debt upon simple contract.

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## C. & J. Wood *v.* Pugh, Gano and Lee.

The prayer of a bill, *supra protest*, for the honor of the indorser, must give reasonable notice to the party that he has made such payment for his credit, otherwise he is not subjected to refund.

This case was adjourned from the county of Hamilton, upon a motion made by the plaintiffs for a new trial. The action was assumpsit, and was founded upon the following state of facts: Thomas

Bell, a merchant of Cincinnati, drew a draft in favor of Pugh, Gano and Lee, on Willis and Robinson, merchants in New York, dated
157] March 21, 1831, at four months. *Pugh, Gano and Lee sold this draft at the Branch Bank of the United States, in Cincinnati, by whom it was transmitted to the branch in New York. The draft was duly accepted, and on the 3d of August, protested for non-payment, and the legal notice given to the parties interested, On the 4th of August, the plaintiffs paid the amount of the draft as under protest; or, in commercial and legal language, *supra protest*, for the credit of the drawers and indorsers; and this suit was brought to recover the amount of Pugh, Gano and Lee, the indorsers.

On the trial, the plaintiffs produced no proof that notice of the payment *supra protest*, for the credit of the defendants, was communicated to them, and the defendants proved that the next day after receiving notice of the protest, they were advised by the cashier of the branch bank of Cincinnati that the draft was paid in New York.

The defendants' counsel moved the court to instruct the jury "that the plaintiffs were not entitled to recover without proving that they gave a reasonable notice to the defendants that they had paid the draft, after protest, for their honor." This instruction was given by the court, and a verdict found for the defendants. For error, in this instruction of the court, the plaintiffs moved for a new trial.

HAINES, in support of the motion:

The only question now presented for the consideration of the court is, "whether the holder of a bill for the honor of an indorser must give notice within a reasonable time of such intervention for his honor, although due notice of non-payment has been given?"

The general rule of law is, that no man can constitute himself the creditor of another without his consent, express or implied. The only exception to this rule is, the payment of a bill *supra protest*. The reasons for this rule are, that it induces the friends of the drawers or indorsers to render them this service, and thereby prevent the great expense attending the return of the bill, and preserves the credit of the trader. The law implies consent of the party for whose honor acceptance is made, from the nature of the *favor* conferred—being gratuitous, and incurring hazard, for the

purpose of rendering a service. An acceptance *supra protest* may demand recompense *for the credit given, for whose benefit [158 the acceptance of payment is made. And in case he redraws on such person, his bill ought to be promptly complied with, besides a grateful acknowledgment of the favor. Thus it would appear, from the language of this celebrated writer on the law merchant (Beawes), that the payer for honor is not only entitled to repayment, but to the gratitude of the parties whose names are saved from discredit. In accordance with this principle, we find in 1 Esp. 112, it is said, "That the common law, and the law merchant as part of the common law, presumes a general standing request to be made by the drawer and indorsers of an unpaid bill, to every friend, to prevent the dishonor of the bill and the burden of heavy damages, in consequence of this. If acceptor *supra protest*, for the honor of an indorser, pays the bill, he may sue the indorser, as he is to be considered as an indorser, paying full value for the bill." Esp. 112. And in the language of Ch. J. Marshal, "No reason can be assigned why the person who has made himself the holder of the bill, by accepting and paying it under protest, should not recover its amount from the drawer and indorser."

As to those parties, he is in the character of an indorser, and as such may maintain an action against all or any of the parties to it, except the person whom he paid, either on the bill or for money paid, etc. He acquires all the right that the holder of the bill had, although no regular transfer be made to him. He is placed in the same position in which he would have been had he purchased the bill after its maturity. In the language of Chancellor Kent, "The policy of the rule granting these privileges to the acceptor or payor *supra protest* is to induce the friends of the drawer or indorsers to render them this service, for the benefit of commerce and the credit of the trade."

We admit that the intervention of a stranger to the bill and payment for the honor of the parties, does not vary the duties of the holder; he is bound to have it protested at maturity, and to have the same notice given to the antecedent parties as if the bill was not taken up; but when that formality is complied with, we claim that his right of action is complete—that he has discharged his duty to the parties, and is then to be considered as an indorsee

for value, and may claim immediate payment and remuneration, 159] by suit or otherwise without *any notice or advice to the parties for whose honor he had intervened.

Why should such further notice be required?

The parties have already, by the protest for non-payment, by the drawer, been notified of the dishonor of the bill, and are thus enabled to protect themselves by obtaining satisfaction from any parties liable to them; for which purpose alone notice is required. They are then put upon inquiry, and it is then their duty to protect their names, and take up their paper, whether in the hands of a regular indorser, or of a friend who has saved their name from dishonor, and the parties from heavy damages. They owe that friend, in the language of Beawes, a debt of gratitude, instead of requiring the further idle act of advising them of such intervention, and thus subjecting the payor for honor to an additional risk, and to one which, if required, would be very apt to put a stop to all these voluntary or gratuitous payments."

How will you distinguish between the acceptor and payor for honor as to these rights? Were the Woods the acceptors for honor and failed to pay at maturity, the acceptance *supra protest* would have been obligatory on them and they might have been compelled to pay. Would it have been then contended that upon such compulsory payment, they could not have recovered against these parties for the want of notice of such intervention? The only object of protesting the bill for non-payment and giving notice is, to entitle the payor for honor, to all the rights of an indorser; for if "the acceptor for honor receive approbation of the acceptance, he may pay the bill without any protest for non-payment." The only object, therefore, without such approbation in protesting for non-payment is, to secure all the rights of an indorsee, and. as such, the books consider a payor for honor. Not a single dictum can be found, requiring the holder for honor, to advise the parties to the bill, of his intervention, and this silence affords a fair implication that no such notice is necessary. There can be no advantage in any such requisition; but, on the contrary, it would tend greatly to increase the risk to all parties connected with this most useful species of commercial paper, and to lessen its utility by a diminution of confidence in its punctual payment.

*Fox, for defendants: [160

In order to determine whether the notice was necessary in this transaction, it will be well to inquire into the character of the party paying *supra protest.*

It is said any person may appear and accept or pay a draft (after the same has been protested) for any one of the parties to the bill, and, on such payment being made, he is invested with all the rights of the person for whose honor he paid. Bailey on Bills, 213, 214.

The person paying *supra protest* can not hold any party who would not have been liable to the party for whose honor the bill was paid. Bailey, 214.

The person paying *supra protest* holds in his original character, and not as upon a transfer from the person he has paid. Bailey, 212, 213.

A perfect stranger, then, it appears, has the right, according to mercantile usage, without the knowledge of a party to the draft of making that party his debtor by a voluntary payment, without his assent; and the question presented is, whether the law imposes no duty on such stranger in order to perfect his right. We contend that the law has imposed a duty on the person thus paying, and we say it is this: That he shall, in a reasonable time, give notice to the person of what he has done, in order to enable the party, for whose benefit the act is intended, to secure himself against the effect of the non-payment.

It is held, wherever an acceptance is made generally, it is considered as made for the honor of the drawer, unless otherwise expressed. Bailey, 45.

Such acceptance, however, may be so worded, that though it be intended for the honor of the drawer, yet it may equally bind the indorser; but in this latter case, notice of *such* acceptance *must be sent to the latter.* Chitty on Bills, old ed., 256; Beawes' Pl. 39,

If the person do not choose to accept in honor of the drawer. "he may accept for the honor of the indorser, in which latter case he should immediately *send the protest in which he made the acceptance to the indorser.*" 16 East, 391; Ld. Raym. 88; Chitty on Bills, old ed., 254; Beawes' Pl. 33, 34.

If we examine the cases, we shall find the uniform practice *of acceptors and payors, after protest, has been to give im- [161 mediate notice to the persons for whose honor they have acted.

Leoux *v.* Leverett, 10 Mass. 1; Konig *v.* Bayard, 1 Peters, 261, 262.

We have, then, the authority of the elementary writers, and the uniform practice of the mercantile world, in favor of the position we assume, viz: that when any one undertakes to pay a draft after protest for the honor of the indorser, he is bound to give that indorser immediate notice of what has been done. This position is sustained in express terms by the elementary writers referred to, and the plaintiffs have not shown a single case where a contrary doctrine has been held.

The analogies of the law are all in favor of the position. There is as much propriety in giving notice in such case, as there is betweeen the parties to the bill or draft. If the object of the notice is to enable the prior party to secure himself, either by taking up the bill and suing the parties ultimately liable to him, or to enable the surety to secure himself from funds of the drawer, why has not the indorser the same right to notice from a perfect stranger to the transaction, who voluntarily becomes a creditor of the indorser without his knowledge, as he would have if a party to the bill wished to make him liable?

It is said, however, that a notice from the holder of the bill is sufficient notice for all parties. We admit that if the holder gives notice to all the parties of the protest for non-payment, any one whose name is on the bill and has paid the note, may rely upon that notice, but it is only the parties to the bill that can take advantage of the acts of the holder, and even then, the parties who rely upon the act of the holder, do so at their peril; for if he acts incorrectly, if he neglects to give the proper notice, the party relying upon it will be affected by the negligence. Every indorser is bound to notify the prior parties to whom he wishes to resort for payment, and if he employs an agent to do it, he is affected by the negligence of the agent.

But we deny that a person paying after protest, can take any advantage of a notice of non-payment given by the holder. Many reasons might be urged in support of this position. In the first place, the bill can not be paid by a stranger until after it is protested. At the time the protest is made, he has no concern or in-
162] terest in the matter; it would be strange, therefore, *that he should be entitled to any benefit arising from the notice of protest. But he afterward, by permission of the law, pays the bill; and then it is that he is required to give a notice to such parties

as he wishes to look to for his indemnity. Is there any hardship imposed upon such a person to require him to give notice of the claims which he thus asserts? On every person who becomes a party to a negotiable paper, this obligation is imposed. No matter how many persons indorse negotiable paper, the law imposes upon each one the obligation, when he pays the note, of giving notice to such of the prior parties as he intends resorting to for payment. To be sure, the holder of the note may, if he pleases, act as the agent of all the other parties to the note, but he need not do it. But it is only prior parties that can take advantage of a notice given by a subsequent party. It is very certain that a second indorsee could not take any benefit or advantage of a notice given by the first indorsee, because he himself would not be liable to the first indorsee.

The position, then, which we maintain is, that every person who becomes a party to a bill, is obliged by himself or agent, to give notice of non-payment to those who precede him, and that nothing unreasonable is required in holding the payor after protest to the same duty. How can an indorser know where to look for his creditor without such notice? His residence may be unknown; where to address him, where to find him, so as to pay and possess himself of the draft, the indorser can not tell. The latter can not take up the draft and thus place himself in a situation to pursue the prior parties, without knowing to whom he is bound to pay it. It is in the power of the party volunteering the payment, to prevent any and all difficulties of this kind, by simply notifying the indorser of the facts. If he is negligent, if he omits to furnish the indorser with notice of his having become his creditor, he ought to bear the loss.

WRIGHT and WALKER, in reply:

We hold that the law does not require notice. It is agreed on all hands that there is no express authority holding notice to be necessary in this case. The defendants quote from several elementary writers on the subject of *acceptance supra protest*, but nothing on the subject of *payment*. The question, *therefore, [163 is strictly one of first impression; and we must argue from principle and analogy only. Now, on principle, we do not see the slightest reason for notice. The indorsers in this case had notice of protest. This was enough to put them on their guard as to prior parties to the bill, which is the only object of notice in any case.

By notice of protest, their liability to the holder was fixed, whether the holder became such in the usual course, or by intervention *supra protest*. Further notice of payment *supra protest* is therefore absolutely nugatory; and the law will not require a useless act. Nor do the analogies of the law merchant require notice. If a bill is not paid, the drawer and indorsers must be notified that they may secure themselves. This is a good reason, and this notice was given. Pugh, Gano and Lee were thus apprized of their liability, and might look to Bell. Here, then, the analogy and the reason on the other side end. But there are expressions and analogies directly in our favor. Thus in Chitty on Bills, 329, the payor after protest must declare "to a notary public, for whose honor he pays, of which declaration the notary must give an account to the parties concerned, either *in the protest itself*, or in a separate instrument." It is then sufficient to give the account *in the protest itself*. This was done in the present case. The protest attached to the bill is explicit as to the manner of payment, and for whose honor; and this is all the law merchant requires. Again 3 Kent's Com. 75, 1 ed., giving the reason why the drawer or indorser is entitled to call for the protest and identical bill or number of the set protested, before payment, says, "without this he might be exposed to claims from some *bona fide* holder, or *person who had paid it supra protest, for his honor*." But if notice of such payment be necessary, he could never be thus exposed; because without such notice he would not be liable. And Kent further says, that it is sufficient to produce the bill and protest at trial. But this would not be sufficient if the party could be entitled to the notice before. For these reasons we insist that the law does not require notice of payment *supra protest*, after notice of protest.

Judge Wood delivered the opinion of the court:

The fact that no case is found in which the question before us has come up for direct consideration is rather surprising, but 164] it forms no available argument for one or for the other *party. It is subject to the plain and obvious answer long since given in such cases; either way, it may have been acted upon as a matter too plain for dispute.

The right of one individual to make another his debtor, by volunteering to disturb rights legally fixed, upon debts due, is confined to this special case of paying a bill *supra protest*, for the

honor of the drawer or indorser. The proceeding has grown up with the law merchant, and we have not attempted to look after its commencement. The elementary writers treat such payor as acquiring an original right in himself against the persons for whose honor he pays, and upon the right thus acquired, he is invested with the rights of the person for whose honor he paid, in relation to other parties to the protested paper. But he acquires no new rights against any one.

Payment, for the honor of the indorser, binds such indorser to refund the amount paid, upon which he is reinvested, with all his original rights, which, until such payment is made, are held by the payor. It would seem but reasonable that prompt notice should, in such cases, be given to a party, upon whom, without his knowledge or consent, these new relations are imposed. The change may very seriously affect his interests; for it might be that every other party to the bill were his debtors, and bankrupts, so that this payment for honor subjects him to a total loss that could not otherwise have occurred. Had the rule been settled, that no notice need be given to an indorser, that a bill had been paid, after a protest, for his honor, we should conform to it; but finding it an open question we are clear in deciding that such notice should be required.

A just conception of the operation of any rule of law can be best obtained at the trial of a case in which it is involved. The temptations it may create, the shifts and resorts to which it may give rise, are very often developed in the course of a trial. There was somewhat of this in the trial of the case now before us, as reported by the judges who tried the cause.

The drawer of the bill resided in Cincinnati, where he transacted a large business as a commission merchant and dealer in produce. He had correspondents and credit in New York, where he was well known to the plaintiffs, and transacted business with them. There, too, lived the acceptor, also an acquaintance of the plaintiffs. The indorsers, the defendants, *were pork dealers [165 in Cincinnati, with no direct commercial connection in New York. In this state of things, it was obvious that, if immediate notice that the payment of the bill *supra protest*, for the honor of the indorsers, was not one part of the rule of law that charged them, they were placed in the most disadvantageous relation to all the other parties to the bill. The day succeeding that on which notice

of the protest was received, information was forwarded that the bill was paid, with no intimation that it was paid for account of any individual party to it. The effect was to induce a conviction on the indorsers that their liability was at an end, and also to re-establish the credit of the drawer. Thus, the indorsers were led to take no steps for their own security, and a door was opened for a confidential understanding between the other parties, in which time was obtained for efforts to restore their credit at the ultimate risk of these indorsers. This might take place, if the rule of notice was not held necessary. And it very plainly shows what a door would be open in just such a case, for swindling impositions. There is no imputation of that in the case before us. But the whole facts tended strongly to suggest what abuses the rule contended for by the plaintiffs, might introdnce into the mercantile business of the country. New trial refused.

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## B. Piatt v. Heirs of St. Clair, Bank of the United States, and others.

An administrator conveying his intestate's lands, sold under an order of court, does not vitiate the conveyance by attaching trusts to it, fairly intended for the benefit of heirs and creditors.

An administrator's sale of land of his intestate may be voidable in the hands of the first purchaser, and yet valid in the hands of *bona fide* second purchaser.

Though an administrator's deed contain no words of perpetuity, yet if the sale was in fact made of the whole estate, chancery would so decree it.

This is a suit in chancery, reserved from Hamilton county. The proceedings were instituted in 1828, and questions of the most complicated character have been frequently presented in various aspects to this court. 5 Ohio, 533; 6 Ohio, 227; Wright, 261, 596.

The case was argued by Messrs. Fox, Wright and Walker, for the heirs of St. Clair, and by Messrs. N. Wright and Worthington, for the bank. The point decided is stated in the opinion of the court.

*Judge LANE delivered the opinion of the court: [166

The general object of the bill is to make settlement and distribution of the estate of Arthur St. Clair, deceased. An account of the debts has been taken by the master under former decrees, and sales have been made of the unincumbered portions of the land belonging to the estate. All these matters have been acted upon, and are considered to be settled. 6 Ohio, 227; Wright, 261, 592. The Bank of the United States was a creditor; and the present question is a claim preferred by the bank, to obtain satisfaction of its debt by a sale of the remaining lands, *provided* a conveyance of certain tenements, which it has heretofore accepted as payment, shall be holden not binding on the heirs.

The facts of the case may be found in 6 Ohio, 227, and Wright, 262. It is not necessary for me to repeat any except those which bear upon the present question.

St. Clair died intestate in 1820. In 1822, Lytle, the administrator, filed his petition to sell lands, and in March, 1823, received the requisite authority. In August, 1823, he sold the estate with the usual forms to Arthur St. Clair, jr., one of the heirs, a minor of about twenty years of age, for the sum of fifteen thousand three hundred dollars. This sale was confirmed by the court, but no money was paid nor conveyance made. On November 12, 1823, the administrator and St. Clair, the younger, by a deed, tripartite, conveyed the land to Benham, a trustee, in trust to hold the land: 1. To secure the payment of the purchase money; 2. To liquidate such debts against the estate as the parties might deem expedient; 3. To secure the ultimate resulting proceeds to the heirs of St. Clair.

On December 8, 1823, Benham, with the assent and authority of Lytle and of the guardian of the children of St. Clair, made the deed now controverted, by which, for certain considerations involving the extinguishment of debts in judgment, and secured by mortgage to the amount of thirty-five thousand and sixty-three dollars, and the advancement of two thousand six hundred and fifty dollars for taxes and other purposes, he conveyed certain lands, parcel of his said purchase, to the Bank of the United States. Two minor heirs of St. Clair are contesting the validity of this deed by an action of ejectment. If it be holden to confer a good title, the debt which the bank once held against the estate is extinguished by it; but if the deed conveys no title, it is conceded to be right

167] *to set up the debt against the estate, and to satisfy it by a further sale of lands. In adjudicating, therefore, upon the validity of this deed, we decide two cases, viz: the ejectment brought by the heirs, and the point presented by the bank, in Piatt *v.* Heirs of St. Clair, to obtain satisfaction of its debt under that decree.

The objections preferred to the trustee's deed are:

1. That it was not made to the purchaser at the sale, but to another person. This objection is removed by a decision of this court, 7 Ohio, 204, where a conveyance to an assignee is held good.

2. That an administrator, exercising a limited and delegated power, to be strictly exercised, has no authority to convey any estate except an absolute fee. If the objection assumes the deed to be void, because it contains no words of perpetuity, it is plain, from the transaction, that the parties contemplated the creation of an entire legal fee simple; and if the power was given, and the execution defective, the mistake will be aided in equity. 2 Ohio, 393; 3 Ib. 529; 4 Ib. 493. But if it be asserted that an administrator can attach no uses to a conveyance of the legal estate, the justice of this position is not recognized. Admitting that, having no interest in the land, he has no power except to convey in fee simple, that he can not, like a donor of an estate held in his own right, prescribe limitations or impose conditions *at law*, yet the legal title may pass by a conveyance in fee made with the requisite forms to a grantee capable of holding the land. When trusts (which are not recognized except in chancery) are attached to such an estate, they affect the parties to the deed only. Where the power to convey subsists in the administrator and a legal conveyance made in good faith, the ulterior disposition of those acquiring the title can not be questioned by heirs, creditors, and strangers.

3. That the sale was fraudulent. It has been found by the first decree, 6 Ohio, 227, that as the parties designed by that sale to secure advantages to the heirs and certain preferred creditors, at the expense of the others, the general creditors might treat it as void, being against the policy of law insuring equal distribution, and might pursue the land for the satisfaction of debts. We do not doubt the correctness of this decision; we intend to carry it into effect. But the doctrine bearing upon the present case lies be-
168] hind this, and has been *discussed but not decided, viz:

whether the holder of a fraudulent title may not transmit a good one to a purchaser in good faith for a valuable consideration.

It will be observed that, in this case, the petition, the appraisal, and the order for sale, being the ceremonies instituted by law for the protection of the heirs, were regularly complied with, and conferred the power to sell. If the purchase of the younger St. Clair had been unattended with collusion, the estate of the heirs in these lands would have rightfully passed to him at their price. The illegality of this sale consists not in an intention to injure the heirs, but in an attempt to create a secret trust for their benefit at the expense of creditors, and in an effort to give unjust preferences among creditors themselves. It is right for the injured creditors to avoid the sale. No person aiding or knowing the fraud can be permitted to set it up to prevent an equal distribution among them. But it is good between the parties; for it is made in the forms of law, and liable to be avoided by those only upon whom the fraud is attempted. If, while matters are in this condition, one of the defrauded parties secures his rights, and purchases the land in satisfaction of his just debts, although such a sale may be set aside by creditors, if it prevent an equal distribution, it seems to us good against the rest of the world. For a fraudulent feoffee may transmit a good title to an honest purchaser for a valuable consideration. His right to convey becomes perfect, by matter *ex post facto*. 1 Scil. 133; 1 Eras. 92; 18 Johns. 515; Sug. Vend. 11, 198; 1 B. & P. N. R. 332. That this transaction was without actual fraud, or intention to injure the heirs, is plain; for it was matured by the co-operation of the administrator and young St. Clair, and the selected trustee and the guardian of the children, all acting in the interests of the family; and it is apparently one of the steps by which the estate was saved from insolvency. The title by a trustee makes no difference; for he had the capacity to hold and transmit it to such a purchaser, in the same manner as St. Clair if he had been of age, and had taken the conveyance to himself.

It is necessary to discriminate between the application of this principle at law, and the equitable doctrine concerning a purchaser for a valuable consideration without notice. The latter emphatically belongs to a court of chancery, is generally used as a defense, and enables him who holds this character to *assert his legal advantage over equal equities. But where the title [169

of a purchaser in good faith, for a valuable consideration, is relied upon in a court of law, the element of notice has no bearing on the case. If such purchaser have notice of the fraud, the books say he knows it does not affect him. Roberts on Fr. Con. 39; Sug. Vend. ed. 1836; 1 Ves. 202; 2 Ves. 51; 1 Atk. 625.

4. That the deed from the administrator to Benham contains no words of perpetuity. Admitting that no fee can be created by deed, without the word heirs, this conveyance may pass at least an estate for the life of the trustee, which is still subsisting, and will prevent a recovery in ejectment.

It has been the effort of the court, in the various decrees which they have rendered in this complicated case, to produce such a final settlement and distribution of the estate as would do justice to all parties. The manner in which the bank acquired this property from Benham has been repeatedly examined, and our conclusion is that they took a legal title in good faith, for what, at that time, was a full consideration, with the consent of all parties in interest capable of acting, and with the approbation of the guardians of the minors, subject only to the claims of creditors for equal distribution among creditors. It is evident that a conveyance in fee was intended, for "all the right of A. St. Clair, at the day of his decease held," is attempted to be conveyed, and the objects of the trust could not be attained without it. If, then, any less estate be conveyed, the suit in chancery, in which all the parties are before us, presents a convenient opportunity to correct the mistake. Without attempting to decide whether the deed is defective, a decree may be taken, declaring the title of the bank, except it shall be necessary to recur to it for equal distribution and enjoining all persons, parties to this suit, to abstain from molesting their possession, and all further questions are continued.

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LESSEE OF MARGARET ST. CLAIR ET AL. *v.* BANK OF THE UNITED STATES.

THIS suit was determined by the adjudication of the preceding case. The reasons of the decision may be found in the opinion of the court.

## *Bank of Utica v. Joseph Card. [170

A discharge of a debt between two citizens of the same state, under the insolvent laws of the state, where the debt was contracted after the laws were enacted, is a good defense to an action on the judgment brought in Ohio.

This case was adjourned from the county of Cuyahoga.

R. Hitchcock, for plaintiffs.

Andrews and Frost, for defendant.

Judge Grimke stated the case, and delivered the opinion of the court:

This was an action of debt on a judgment rendered in court in New York, in the year 1826. The suit in which this judgment was obtained, was founded upon a promissory note made in the state where both the parties were resident at the time. The defendant was arrested upon execution on this judgment, and obtained his discharge under the insolvent law of that state, on making an assignment of his property. These laws were passed, the one April 12, 1813, and the other in the year 1828. The latter, however, is merely auxiliary to the former, prescribing certain formalities which shall be observed by any one who makes application to be relieved under the provision of the former. These laws undertake to discharge, not merely the person of the debtor, but the debt itself. And the single question which it is of moment to decide is, whether such discharge can be pleaded in the courts of Ohio to an action on the judgment. This was once a very difficult and a much litigated question, but it has been finally settled by repeated adjudications of the Supreme Court of the United States. In Sturges *v.* Crowningshield, 4 Wheat., it was decided that a law passed after the debt was contracted was unconstitutional. In McMillen *v.* McNeil, at the same term, the law was enacted prior to the making of the contract, and it was said by the chief justice, that he did not consider that that circumstance made any difference. In that case, however, the debt was contracted in South Carolina, and the discharge was obtained in Louisiana, and, there-

fore, the defense could not, for that reason alone, be regarded as a valid one. Indeed, it is difficult to conceive how it can be competent for Congress to pass a law impairing the obligation of contracts, and yet unlawful for the states to do so, notwithstanding the prohibition in the constitution extends only to the latter. In Ogden *v.* Saunders, 12 Wheat. 213, the law under which the defendant obtained his discharge, was prospective in its operation, 171] *and it was then finally decided that the power of Congress to establish a uniform bankrupt law, does not exclude the right of the states to legislate on the same subject, except when the former is actually exercised by Congress, and the state laws conflict with those of Congress. It was further decided that a bankrupt or insolvent law of a state, which discharges both the person of the debtor and his future acquisitions of property is not a law impairing the obligation of contracts. And although repeated attempts have been made to shake this decision, yet it has been reaffirmed as often as it has been questioned; the chief justice, in Boyle *v.* Zacharie, 6 Peters, 348, 635, declaring that the principles settled in Ogden *v.* Saunders are no longer to be questioned or considered open for controversy. The only limitation to the effect of a discharge now is, that it can not be pleaded in bar of an action brought by a citizen of another state in the federal court, or by a citizen of any other state than that where the discharge was obtained. In Smith *v.* Parsons, 1 Ohio, 236, the question was settled in our own courts. It was there decided that a discharge under a law of the state where the notes on which the suit was brought were made, was a good defense to an action in the courts of Ohio. This important question, therefore, may now be considered as finally closed. Insolvent laws constitute a part of the law of the contract, and where a discharge has been obtained in the state where the contract was to be performed, it is a complete bar to any subsequent suit.

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THE TRUSTEES OF CENTER TOWNSHIP, GUERNSEY COUNTY, OHIO, PLAINTIFFS IN ERROR, *v.* THE TRUSTEES OF WILLS TOWNSHIP, GUERNSEY COUNTY, OHIO, DEFENDANTS IN ERROR.

When a new township is established, paupers having residence within its territorial limits are chargeable upon it, though before charged upon the entire township from which it is taken, in whole, or in part.

ADJOURNED from the county of Guernsey.

This was an amicable action in debt brought by the trustees of Wills township against the trustees of Center township.

The declaration contained one count and plea, the general issue. The suit was brought to recover for necessaries furnished to William Smith, a pauper, and submitted to the court of common pleas at October term, 1835, upon a statement of *facts. The [172 court rendered judgment for the plaintiffs below, and this writ of error is prosecuted to reverse that judgment.

The facts agreed and submitted to the court were substantially these: About twelve or fourteen years ago Center township was organized and included part of Wills township, which had been organized before. Smith, the pauper, had a settlement in Wills township, and owned land there, on which he had resided about six years before Center township was organized. Smith sold his land and left the county, and has remained out of the county ever since, until 1835, but has gained no settlement since he left Wills township. When Center was organized, it included in its limits the farm on which Smith lived when residing in Wills township. Smith returned to Wills in 1835, and became chargeable, and has been supplied there; he was legally tendered to Center by Wills, but Center refused to receive him or pay Wills for supporting him.

ISAAC PARISH, for plaintiffs in error:

The plaintiffs in error think that it is no difference whether *all* or *part* of Center was taken from Wills, so far as their case is concerned, and refer for authority to Groten *v.* Shirley, 7 Mass. 156.

2. There is a material difference between a legal *settlement* and an actual residence or inhabitancy at the time of erecting the new township, which is to be attended to in this case, and for authority refer to 4 Mass. 280, 390, 453, 479; 6 Mass. 446; 7 Mass. 157.

3. They think the *settlement* is co-extensive with the township, and not affected by local habitancy, and the converse of this proposition is, that the liability to support on the part of the township is a corporate liability. Windham *v.* Portland, 4 Mass. 384–389, Judge Spencer's opinion; Pike *v.* Union, 5 Ohio, 528, 529, Judge Wright's opinion.

4. They think, on common principles, this liability remains to Wills, under the circumstances of this case. See Brewster *v.* Harwich, 4 Mass. 278, Spencer's opinion, p. 280; Windham *v.* Portland, 4 Mass. 384, Judge Spencer's opinion, p. 390.

5. They think the statutes under which Center was erected do 173] not vary these principles. See 1 Chase's Stat. 700, act *of February 19, 1810; 2 Chase's Stat. 1089, act of January 24, 1820.

James M. Bell, for defendant in error:

In this case the defendants in error make this single point: That in a new country like this, when the creation of new townships is of such frequent occurrence, the only reasonable and safe rule that can be adopted touching the *settlement* of paupers is to make the township chargeable which includes, within its bounds the territory on which the person to be supported is a pauper, had his last actual residence, and on which he had gained a settlement. Any other rule, it appear to me, would lead to great and innumerable difficulties, and, in some instances, would deprive a pauper of support entirely; for the cases are not rare, where the names of townships have been changed, or where, in the division of an old township into two or more new ones, the old name has been abandoned. The case of North Whitehall *v.* South Whitehall, 3 Serg. & Rawle, 120, is one in which it appears that an old township name was lost, and two new towns erected out of an ancient town, both taking new names. In such case, unless the rule I have suggested be the correct one, where would the pauper go for support, who had gained a setlement in the old township, but was not an inhabitant at the time of the division? The old corporate name, to which so much magic seems to be attached, is gone entirely; and if the principles assumed by the counsel for the plaintiffs in error be correct, all liability for the support of paupers goes with it. The *name* is everything; the territory or locality, nothing.

But a very few years previous to the time at which the pauper,

Smith, sold his farm and left the country, the county of Guernsey was erected, the greater part of the new county being taken from the old county of Muskingum. Before that time, Wills township, *Muskingum county*, was in existence, and included within its bounds nearly the whole of what is now Guernsey county. The county of Muskingum has now no township named Wills. Suppose this man, Smith, having gained a settlement in Wills township, Muskingum county, had, previous to the erection of Guernsey, left the county, and now come back a pauper, where is he chargeable? Wills *township, Guernsey county, could [174 hardly be made to bear the burdens of Wills township, Muskingum county; and the last-mentioned *name* having now no existence, the pauper is completely without the means of support.

The case of Mansfield *v.* Granby, 1 Root, 179, is very much like the case now before the court; indeed, the facts are exactly similar. In that case the court make the defendants liable, "upon the principle, that had the pauper remained in Granby she would have been an inhabitant there. Her being gone out of the place at the time of the incorporation, and not having gained a settlement elsewhere, could make no difference in the reason and nature of the case."

HITCHCOCK, J., delivered the opinion of the court:

The simple question for the consideration of the court is, which of these two townships are liable for the support and maintenance of this pauper?

A recurrence to our statutes for the organization of townships, and for the support and maintenance of the poor, prescribe no rule by which we are to be governed. The solution of the question must depend rather upon the sound discretion of the court than upon any principle of law. There are decisions, it is true, in some of the other states, and more particularly in the states of Massachusetts and Connecticut, which have a bearing upon the question. But the laws of those states, and the modes of incorporating townships, are so different from ours, that those decisions can not be held to be of binding authority. In these states, however, townships are incorporated by special legislative enactment; here we have a general law upon the subject, and the county commissioners are authorized to divide old or set off new townships. There provision is usually made for the distribution of paupers,

where a new township is incorporated, and this is necessary in consequence of the number of paupers. Here nothing is said upon the subject; and the reason undoubtedly is, that we have had but few of this description of persons among us.

We suppose that where, under our system, a new township is set off, all persons residing within the limits of that township, and who have resided there a sufficient length of time to obtain a settlement in the original township, have a legal settlement in the 175] new township; and this, although at the time a *portion of these inhabitants are actually paupers. This principle seems to be contradictory to that laid down by the court in the case of Pike Township v. Union Township, 5 Ohio, 528. It must be remembered, however, that that case was decided upon the circuit, and experience teaches us that such decisions are, many times, made without that reflection which a case ought to receive before it is adopted as authority.

Upon the assumption that when a new township is set off, all persons residing within its limits have a legal settlement therein, it follows that had Smith remained at his domicile in Wills township, he would now have had a legal settlement in Center, and that township would have been chargeable with his maintenance. Shall the fact that he was away when Center was organized make any difference in the case? It seems to us it should not. In coming to this conclusion, we are in some measure, I may even say in a great measure, influenced by the pecular situation of the country. But a few years since, some townships were equal in extent to what are entire counties. Still, in some they are five or six miles square, and the original township name is retained. It would be impolitic, it would be unjust, to compel the township thus limited to maintain all those who were paupers at the time of the division, or who, residing in other parts of the country, have become such since the division.

It seems to us that there is nothing erroneous in the judgment of the common pleas, and it is, therefore, affirmed with costs.

## Redick McKee *v.* The Bank of Mount Pleasant.

One partner makes a bond and a warrant of attorney to confess judgment, under seal, and in the name of the firm, upon which judgment is confessed before the other partner has any knowledge of the transaction. His remedy is to have the judgment vacated, on motion, in the court that rendered it. Chancery can not interfere.

Reserved in the county of Belmont for decision in the court in bank.

The bill states that on June 27, 1829, one David B. Bayless, a merchant at Wheeling, in the State of Virginia, being desirous of borrowing of the bank of Mount Pleasant two thousand dollars, executed a bond and warrant of attorney, and also procured the signatures of Knox and McKee, the *complainant, William [176 B. Tynson & Co., Jones & Ritchie, and E. B. Swearingen & Co., as his securities; the names of the *firms* being all signed to the said bond and warrant of attorney by the several first-named partners without any knowledge, authority, or consent of the *copartners*. The obligors, at the time of the execution of the bond and warrant of attorney, resided, and still do reside, in Virginia, with the exception of Bayless, who has since deceased. The bill states that all the obligors but Bayless were only *securities*, but the bond itself recites they were *principal debtors*. On this bond Bayless obtained the money of the respondents. Before May 10, 1830, Bayless died in Wheeling, and John C. Bayless was appointed administrator. On May 10, 1830, the surviving obligors sent a written notice to the respondents to sue the administrator of the *principal debtor*, or they should consider themselves discharged from liability on the bond and warrant of attorney. This notice the bank for a while disregarded, and on May 19, 1830, entered up a judgment on the bond and warrant of attorney in the Supreme Court of Belmont county.

This judgment is against the complainant and all the other obligors.

On March 5, 1831, in pursuance of notice of McKee and others, the respondents commenced a suit against the administrator of Bayless, in Virginia, who appeared on the 10th March, on the return of the writ, and confessed a judgment for the amount

due, with stay of execution of this judgment until the next August term.

On February 28, 1834, the respondents issued an execution on their judgment, which was entered in the Supreme Court in Belmont county, on which execution the real estate of the complainant was taken. McKee, the complainant, obtained an injunction to stay the sale, and now asks us to perpetually enjoin the respondents from the collection of this judgment, and for other relief.

The respondents, in their answer, deny that any of the obligors were sureties, but *all* principals, and were so treated and considered by the bank in obtaining the loan; that the respondent never knew that the complainant denied the execution of the bond by his partner as obligatory on him, but, on the contrary, he authorized and sanctioned it. The answer further admits the judgment on the bond, and warrant of attorney, and the issuing 177] *execution and levy on the complainant's property. In a supplemental answer, the bank admits the judgment against the administrator in Virginia, and that stay of execution was entered of record, as stated in the bill. But the respondents aver no knowledge of such proceeding in Virginia until the filing of the complainant's bill; that no such proceeding was ever authorized by the bank, but that the suit was commenced by an attorney, at the instigation of the administrator *himself*, and the whole business arranged by him and the other obligors.

A supplemental answer was filed, the object of which was to correct some errors in fact, set out in the original answer. No exception was taken to the filing of the supplemental answer until the cause came up for hearing.

PECK, for the complainant:

1. Were these parties the securities of D. B. Bayless?

2. Was the bank obliged to take any notice of the request to sue?

3. Having brought suit in pursuance of such notice, is it not bound to notice them as securities?

The fact of securityship is amply proved both by the answers of the obligors to the interrogatories of the bank and by the testimony.

The answers are full and positive. The testimony of J C. Bayless is to the point and full. The testimony of the old cashier

Walker, is full to the point. So are the entries in the books of the bank, where D. B. Bayless is charged alone with the money, and it was drawn out on his check, and he alone is credited with the payments.

So it is proved by the bond itself; for it is provided that the time of payment might be extended without impairing the liability of any one on the paper at the option of the bank. This presupposed some of them to be securities, else this clause would have been senseless.

The clause of "principal debtor" was inserted in the bond, as it would seem, by the testimony of Harris, the cashier, to evade the law made for the benefit of securities, and for no other purpose.

I take it to be fully and satisfactorily proved that at the time of the discounting of the bond the bank were well aware that the obligors, except D. B. Bayless, were only his *securities, [178 and that they so treated the parties at the time; but if they were not cognizant of this fact at the time of the loan, they were unquestionably fully notified of it on May 10, 1830, by means of the written notice.

Was the bank under any obligation to act upon the reception of that notice?

In Ohio it would not be necessary to sue an administrator if he acknowledged the debt, and was willing to pay it; but in Virginia the executor or administrator stands so much in the shoes of his testator or intestate, that the goods of the testator can be taken by execution on a judgment against the executor; and then the executor is obliged to pay judgments and decrees first, and specialty creditors next, and simple contract creditors last. Hence the necessity of a judgment against the administrator in this case. The usual course in Virginia, when there are judgments, specialty and simple contract debts, is for a simple contract debtor to file his bill in equity, and so soon as he gets a decree on his own behalf, and all others who may come in and prosecute under his bill, he stops the assets, and the court orders an account to be taken, and makes a *pro rata* distribution. Hence the anxiety of the obligors, in this case, to have a judgment so as to bind the assets, and prevent the simple contract creditors from coming in.

The excuse the bank makes for not immediately commencing suit on the reception of that notice was, that they were all *principal debtors*, and were not securities, and rely, I suppose, on the

principal debtor clause in their bond, though this does not plainly appear.

Perhaps this is the first time that the question has been raised, whether if one acknowledges himself principal in a bond, can he be permitted to prove himself but a security only.

I do not see how this clause can alter the legal effect of the bond. The law puts that construction on a mere joint or a joint and several bond; this *principal debtor* clause is but the mere conclusion of the law on all instruments of more than one obligor, unless it otherwise appear on the face of the instrument. I do not see why one should be concluded by inserting a mere conclusion of the law; it does not alter the fact.

This bond on its face is false and contrary to the intent of the 179] parties, and for that reason it is *prima facie* fraudulent, *and it is an acknowledged fraud on the statute, and therefore parol evidence is admissible to show the real transaction. 1 Johns. Ch. 125.

This bank has the privilege of issuing three times the amount of paper to the stock paid in. This is not enough, but they must have two and a half per cent. over the interest allowed them for attorney's fees. This is not all; they must have a warrant of attorney, executed before their money is loaned, and then make a law that all who deal with them must be principals—no securities there. I think that the court should not be overscrupulous in dealing with such contrivances.

I think, however, that at law this principal debtor clause might have been pleaded or replied as an estoppel, and if the bank wished to raise that question, they should not have acted on the notice at all, and it should have pleaded this matter here as an estoppel, or they should have demurred, and thus raised the question unmixed with others; and I think that, even admitting that the obligors were concluded by that recital in the bond, yet here the bank's course of conduct on the notice, and their manner of pleading have fully opened it, and let the truth fully appear.

I take it to be a well-settled elementary principle, that if a party intends to rely on a bare legal estoppel, he must put his defense precisely upon that point; but that if you go into the merits, you must take the whole merits.

In this case the bank have taken issue on the securityship, have denied it, and not that alone, they call upon the obligors to answer under oath whether they were securities or not; this is done

in every varity of shape to get at the whole merits of that question, and is answered as fully and explicitly.

Now, if the obligors in a common note, or one stating that they were securities, were called on in this way, they would have to discover the truth, would the holder of the paper be bound by such a recital, if untrue? The rule must be mutual; now, in this case, the obligors are bound by their answers in all respects; and must not the bank be bound likewise? There can be no doubt of it, unless they can prove them untrue. It is a question which the bank have opened, and that, too, in the most ample manner.

In fact, it does not deny but that it knew that, as among themselves, the obligors might have been the securities of D. B. Bayless, but that it was in the habit of taking bonds in *that [180 way (no doubt to evade the statute), and consider them as principal debtors. Perhaps the bank would have been justified in treating them all as principals until notice of the securityship in writing; but that, after that notice, however justifiable they might have been in lying idle, they could only act at their peril. On the reception of this notice, they do treat the obligors as securities. The request to prosecute the administrator in Wheeling was most reasonable, especially when accompanied by an offer of indemnity against costs. In pursuance of that request, the bank did sue the administrator; and here, again, after the judgment against the administrator, the bank possibly might have laid idle, but it does another act, greatly to the prejudice of the obligors, that of staying the execution. This was, in every sense of the word, unjustifiable.

Admitting that the bank might have disregarded the fact of securityship of notice to sue, and objected on account of the administrator's residence in Virginia, yet they have done it voluntarily after notice, and must be bound by it and abide the consequence. Indeed, I apprehend that under the circumstances, even though they were all principals, the creditor has no right to get a judgment against one and stay the execution; for if the other were to pay, they could have no contribution of him until the stay should expire. The creditor may sue which of them he pleases, or all, or let it rest; but he has no right, in equity, at least, to intermeddle with the remedies and rights of the obligors, as among themselves.

In the case of the Bank of Steubenville v. Hoge and others, in

a suit at law, this court decided that an obligor is not estopped at law from showing himself security, in a case identical with this, except the principal debtor clause. The court say, "that if the obligation recited that the obligors were principals, there might be color for the assumption that the admission concludes them. In the absence of such recital, we find nothing to stop them from proving the truth." 6 Ohio, 18.

This clause of giving time of payment, from time to time, may be ended by notice. 6 Ohio, 512.

The answers to those interrogatories, so far as they go, are as good evidence as any other; for when one party calls for the testimony of the other, he makes him a witness in the case. 3 Pet. Cond. 319.

If, then, these obligors can prove themselves securities, or if 181] *that question has been opened by the bank, as I think it has, this case is decided; for it is well enough settled that such an act, either as the refusal to sue, or the stay of an execution against the principal without consent, if there is no other sufficient ground for relief, this is sufficient. 5 Ohio, 207, and the cases there referred to.

A security may call upon the holder of paper on which he is security, and compel him to sue the principal without any statute for that purpose. It is but natural equity, and justice requires it.

ALEXANDER, for respondents:

Three questions arise in this case.

1. Were McKee, Kiger, and Ritchie bound by the act of their partners in executing the bond and warrant of attorney, etc.

2. If they were, were they and the other obligors discharged by the conduct of the bank on the receipt of the notice to prosecute?

3. Or were they discharged by the stay of execution?

In going further into the case, we shall take it for granted that the depositions excepted to, are ruled out, and that they should be, is so palpable that nothing need be said on the subject.

1. Were McKee, Kiger, and Ritchie bound by the act of their partners' judgment in Ohio, etc.?

These persons' names were not only signed by their partners to the bond, but also to the power of attorney, by virtue of which their attorney appeared in court for and confessed judgment

against them. Is not this act of their attorney binding on them? The presumption is, that their attorney had sufficient authority to act as he did, and this authority might have been either the power attached to the bond or other tantamount authority; and the presumption is by no means rebutted by any legal testimony in the case.

Again, the facts would warrant this view of the case, that their names, viz: their firm names, were signed as principal debtors, that the two thousand dollars were drawn and divided among them, that a certain portion went into the funds of each partnership, and, consequently, an existing equitable liability rests upon all. And this might be the case, independent of *any bond, [182 warrant of attorney, or judgment. This is the strong probability. Hence their attorney appeared for them, and confessed judgment. This judgment, then, should not be set aside, unless the most positive evidence is adduced to show a total absence of authority in the attorney who acted for them, etc.

2. Were they discharged by the conduct of the bank on the receipt of the notice to prosecute?

On this subject it is said, in the argument for complainant, that the bank, even if the notice might have been disregarded on account of the administrator's residence in Virginia, etc., yet having voluntarily regarded it, that by so doing its obligatory power is recognized.

In answer to this, we say, that the bank has in no act acknowledged any such power; and, even in the answer, protests that the notice could have no such obligatory power.

If the bank were bound to regard the notice, she did all that law or equity required. The statute of Ohio reads, that if any person shall become bound as surety or sureties by bond, etc., for the payment of money, etc., and shall apprehend that the principal is likely to become insolvent, or remove from the county and state, etc., such person so bound may, by notice in writing, require the creditor forthwith to put such bond, etc., in suit, provided a right of action shall have accrued, etc., and unless this is done in a reasonable time, the surety, etc., shall be discharged.

Section 3 of the act provides, that nothing in the act shall be so construed as to affect bonds with collateral conditions, etc.

The common law, it will not be claimed, extends further than the statute or near so far.

The question arises here, did the bank put this bond in suit in a reasonable time after the receipt of this notice? The notice was sent to the bank on May 12, 1830, and on May 19, 1830, only seven days after, the bond was not only put in suit but judgment obtained. This must have been done by order of the directors at their next meeting after the receipt of the notice, as they only meet once a week as other banks; and this was done in accordance with their practice, as stated in their answer. In any way of putting it, the bank could only be bound to regard the notice 183] as binding *according to the statute or the common law doctrine on the subject, and so far the bank has fully complied.

But the bank was not obliged to regard the notice as obligatory, or pay any attention to it whatever.

What is the language of the notice? It is in effect that we, the obligors, having indorsed for the late Mr. D. B. Bayless for two thousand dollars, and eighteen hundred dollars remaining unpaid, deem it necessary for our safety that the bank request a judgment from him, or we will not hold ourselves bound for the same. We further say, that if you will send us the bond by the bearer, we will attend to it ourselves, etc.

The notice does not require the bond to be put in suit; it does not say that Bayless is likely to become insolvent, or leave the county of Jefferson or Belmont, or the State of Ohio, or the commonwealth of Virginia. It is therefore, in itself, insufficient. It asks too much. It requires more than the bank could reasonably do, and more than law, equity, or common sense would say she should do. We, the obligors, say unto you, bank, go to Virginia, and request a judgment from Bayless, the administrator, or send the bond to us, or we will not hold ourselves bound for the same. Bayless perhaps resided in Virginia, Ohio county. The bank says she did not know where he resided, and it is not proved that she did know. But suppose she did know that he did reside in Ohio county, Virginia, was she bound to go there and make the request? If she was, she was on the same principle bound to go to Accomac county, Virginia, or any other town or county in the United States, or in North America, or any port of the whole globe, the city of Amsterdam not excepted, if Bayless perchance had resided there, and then and there go to the trouble and expense, and encounter the delay of prosecuting an estate, doubtful as to the solvency, for the purpose of collecting this money, and at the

same time these obligors having property at the very door of the bank. The proposition needs only to be mentioned in order to see its absurdity, and it matters not whether those who executed the bond were principals or sureties.

But were they bound as sureties? In the bond they bound themselves as principal debtors, and agreed that the bank might extend the time of the payment thereof from time to time, etc. And it necessarily follows, that if they were bound as principals, the notice might be disregarded by the bank. The testimony is, that the bank used bonds of this description for the purpose of making all the obligors principals as between *them and the bank, [184 and without doing so, the bank would not discount any bonds; and in faith of this, the obligors got the two thousand dollars. This, then, was the contract and understanding of the parties, and this, their intention, should be carried out by this court.

It appears plain, from the bond and testimony, that the obligors were all principals as between them and the bank, and nothing has transpired to change this relationship.

If these obligors wished to have a judgment against Bayless, the administrator, they should have first paid the bank, and then proceeded against him where they could have found him. This would have been fair sailing.

In complainant's argument it is said that judgments in Virginia have precedence, etc., and for this purpose they wished the bank to request a judgment, etc. There is no evidence in the case that this is the fact; but admit that judgments have precedence, a judgment was obtained seven days after the notice, and is certainly entitled to precedence, even if obtained in Ohio. The bill claims that obligors were discharged by the refusal of the bank to sue according to notice. The argument for complainant claims that the bank complied *voluntarily* with the notice to sue, and is bound by her act; and, therefore, obligors discharged (loco foco), because the notice was not properly complied with. Scylla on one side and Charybdis on *t'other*.

There is another view that might be taken of this case, that is, that D. B. Bayless, who is said to be the principal in the bond, was deceased at the time notice was given, and consequently the statute could not reach the point made.

Neither the statute nor common law requires us to run after "dead men's bones" for money, when we can get other property,

and that, too, at home, and not in a foreign land, etc. This fact, alone, is conclusive on this point.

3. Were the obligors discharged by the stay of execution?

Having almost a perfect confidence that this question is settled by supplemental answer, etc., we shall pay but little attention to it. In the bond the obligors bound themselves jointly and severally, as principal debtors to the bank; this gave the right to the bank to sue all jointly or each one separately, or any one of them alone; and over any such suits a perfect control, at least so far as the staying of execution might be concerned. This view of the case is aided by another clause in the bond, viz: that clause that gives 185] the *right to the bank to extend the time of payment from time to time, etc.

It is insisted on in the argument for the complainant that this would affect the right of contribution among the obligors. This is not true. If the bank had commenced several suits on this bond and obtained judgment against each one, and stayed execution on all except one, and on that one made the money, it is perfectly obvious, in our opinion, that in an action for contribution by that one against the others, the stay of execution could not affect his rights.

The obligors then bound themselves as principals, and must blame themselves, and not do it again. They might have been but the sureties of Bayless, as between them and Bayless, but this matter they may settle among themselves. The original answer of the bank states, responsive to the bill, that stay was given without her consent or authority, and this is sustained by the depositions both of Bebee and Atkinson; and the question whether the bank ever consented to or authorized the stay of execution is put in issue by replication to answer. The truth is, as appears from the testimony, that the bank not only did not authorize or consent to the stay, but never knew of the judgment or stay until the filing of this bill. The pretended securityship, if true, could not, under the circumstances of this case, if the bank had given the stay, release them. There is an equity arising from the nature of the bond, judgment, and other facts in this case, going to show the understanding of the parties that will vouchsafe this claim to the bank. In conclusion, we have a few words to say in reply to some other arguments of complainants, also, as touching this case generally.

It is argued that the warrant of attorney attached to the bond was void because it was executed in Virginia, and that the bond is false on its face, a fraud upon the statute, etc., and also void.

This is almost a little too absurd to notice. The intention of the obligors was to have the bond discounted at the bank in Ohio; the warrant of attorney was attached to it. At the bank in Ohio it took effect, and in Ohio it is legal; also in Virginia.

There is no law in Virginia that prohibits people from signing bonds and warrants of attorney, nor is it proved that this bond, etc., was executed in Virginia.

*Again, we say that the bond is true on its face, and [186 shows the intention of the parties as between the bank and obligors. As between themselves, we care not whether it is true or false.

Would these obligors execute instruments of writing forbidden by the laws of Virginia? Would they commit frauds upon the statute, etc? They say they would, or have; and if they would, they would try to cheat us out of our money.

It is also argued that as to the question of estoppel, that it can only be raised by plea or demurrer.

It is insisted upon, in the answer of the bank, that these obligors, having bound themselves as principals, can not now say that they are only securities.

Is this not sufficient? Can not the question be raised by the answer, as well as in any other way? We think it may. And we still insist upon it that these obligors are estopped from saying that they only are securities.

As to the solvency or insolvency of the estate of D. B. Bayless, there is no legal testimony in the case; nor does it appear that the obligors have or will lose anything, if they have to pay the money, and by no means does it appear that they have been injured by the conduct of the bank.

There is a contract existing between these parties, evidenced by the bond and warrant of attorney. In construing this contract, we must look at the words and expressions made use of in it. These are plain, and upon its face there is certainly no ambiguity, and as to the meaning of it and the intention of the parties there can be no dispute.

There is also a judgment existing between the parties. This judgment was obtained by virtue of the warrant of attorney, which was surely sufficient. It never was revoked, and could not

be, being coupled with an interest, etc.; and it did authorize, to the fullest extent, the power exercised under it by their attorney, who confessed the judgment.

These matters go to charge, independent of everything that has been said, a liability existing, upon those who seek to be released, for the payment of this money.

The two and a half per cent. rests in contract, and it is nothing more than just that the bank, in this case, should be indemnified against all costs and attorneys' fees, when agreed upon by the parties.

One word as to the predicament in which these men have placed themselves, in order to get rid of the payment in this 187] *case. In the first place, more than one-half of these obligors signed the bond and warrant of attorney in the firms' names without the knowledge, consent, or authority of their partners, as they say; and having done so, never informed them. In the second place, they signed said bond as principal debtors, and when interrogated under oath, they signed it only as securities; and lastly, they say they committed a fraud upon the statute in signing said bond, it being false on its face; and violated a law of Virginia in signing the warrant of attorney, etc., it being prohibited.

Do they love money? For it they are willing, as they say, to commit *forgery!* For it they are willing, they say, to commit *perjury!* For it, *frauds* upon the statute, and *violations* of the laws of their native state. But do they love wickedness? Would they speculate upon their characters? Would they barter for money their honesty, their faith, and their sacred honor? If they are willing to admit all this, we are unwilling to believe it. Nor do we charge it, as they might have been in part mistaken; though even this is strongly rebutted by the fact that the most of them of their own accord, and moved by the love of money, gave depositions *strong* and *full*, each one to clear his fellow, and in their argument cite authority to establish their own disgrace.

We ask a decree against these obligors, especially Knox, Tyson, Jones and Swearingen, who signed the bond, etc., for the whole amount of the judgment, except the amount paid. As to McKee, Kiger, and Ritchie, we admit that their liability is, to a certain extent, doubtful.

Judge Wood delivered the opinion of the court:

A question of fact is presented in this case, as to the complainant's assent to the execution of the bond by his partner. This allegation is averred by the respondents in their answer, but this averment avails nothing as proof, because it is not in response to anything charged in the bill. Besides this, the answers of the complainant and others, to the interrogatories propounded in the respondent's answer, make a strong impression that the complainant knew nothing of the bond and warrant of attorney, until after the confession of judgment.

It is well settled that one partner can not bind his copartner by bond under seal, unless specially authorized to do so. There is, in this case, no evidence of any such authority, or *of any rati- [188 fication of the bond or warrant of attorney, in act or deed, by the complainant. He can not then be concluded by them. The warrant of attorney conferred no power from the complainant upon the attorney who acted under it in confessing the judgment, and the case must be one for relief somewhere. Can it be obtained by bill in chancery?

This question has been decided in Critchfield *v.* Porter, 3 Ohio, 522. That was a case where an attorney appeared for the complainant without authority in a suit at law, went to trial, and a verdict and judgment were rendered against the complainant, who filed his bill in equity for relief. The court say the complainant has relief *at law*, by *motion in court*, where the judgment was rendered; that it was fully competent for the court to give the complainant all the relief, on motion, he could obtain in a court of equity; that it had become one of the *plain* and *accustomed* remedies of a court of law to afford full and adequate relief against judgments, irregularly or improperly obtained, when there had been no fault nor negligence on the part of the judgment debtor; and this relief is to be had on a motion to set aside the judgment addressed to the court by whom it was rendered, and upon whose records it remains. Consequently, he can not be relieved in equity, and this bill must be dismissed.

## Robert Vincent v. Lessee of Goddard.

A purchaser from a judgment debtor, of land actually levied in execution, is not entitled to the benefit of the occupying claimant act.

This case was reserved from the county of Holmes.

The plaintiff below recovered judgment in ejectment, against the then defendant, Robert Vincent, on a sale under execution against A. Dougherty. The defendant claimed, under a sale from Dougherty after the rendition of the judgment, and after the levy, and also under a sale for taxes. He now applies for relief under the occupying claimant law.

Avery and Leadbetter, for the applicant:

The applicant is entitled to relief, under either of two distinct provisions of the statute: 1. Because he holds by deed, according to the terms of the act. 2. Because he holds under a sale for taxes. 189] The act is entitled to a liberal *construction; the whole course of legislation upon the subject, and the reported decisions show this. The judgment creditor can have no equitable claim to satisfy his demand by a sale of what was not levied upon. Although, on this subject, the occupying claimant law, and the law with regard to judgments and executions come into conflict, yet what reason is there why the former should give way, rather than the latter. The law is fully stated in 5 Ohio, 158; and in Sellers v. Corwin, 5 Ohio, 398, it is decided that purchasers under execution must pay for the improvements. But the plaintiff is also entitled to relief under his tax title.

Spangler, contra:

It is not every case in which a claimant may show himself within the letter of the statute that will entitle him to its benefits. He must not show a case of fraud and collusion. In Shafer v. Magin, 2 Ohio, 237, the remarks of the court show that the occupying claimant law should be so construed as to be subservient to the ends of justice. The cases cited by the counsel on the other side have no application. In 5 Ohio, 398, the purchaser under execution was held liable for improvements, under very different circumstances from the present. The claimant bought the land sub-

ject to the lien created by the levy. As to the tax sales, their date, the date of claimant's deed from Dougherty, the fact that claimant permitted the land to be sold for taxes, and afterward bought in the certificates, show a case too highly tinctured with fraud to entitle him to the relief.

Judge GRIMKE delivered the opinion of the court:

This is an application by a defendant in ejectment, under the act for the relief of occupying claimants. Both parties deduce title from Andrew Dougherty, against whom a judgment was rendered in 1822. In 1824, an execution issued, and a levy was made on the land; and in 1831, the lessor of the plaintiff, became the purchaser. On December 12, 1826, Dougherty, the judgment debtor, conveyed to the defendant. Is the latter entitled to compensation for improvements? The act declares that he shall have the benefit of all improvements made before receiving actual notice, by the commencement of an adverse suit. And if the right only depended *upon this part of the statute, perhaps it [190 would be difficult to deny him relief. At any rate, it is unnecessary to examine, whether this is to be deemed an adverse suit. For there is another provision in the law, which declares that "a purchaser having obtained title without any fraud or collusion on his part shall not be turned out of possession without being paid for improvements." A judgment, where no *scire facias* is necessary, and, except as between different judgment creditors, is a perpetual lien on the land of the debtor; only, it is presumed, like a bond at common law, to be paid after a lapse of twenty years. It is, to be sure, a general, and, not like a mortgage, a specific lien on the land. But when this judgment was followed up by an execution, and an actual levy on the land of the debtor, no one, who afterward received a conveyance from him, could be considered a purchaser in good faith. It is true a levy on land does not, like a levy on goods, divest the debtor of his property, but it is such a decisive and unequivocal act leading to this result, that no one could mistake it, and no one purchasing afterward can be said to be absolutely exempt from fraud and collusion. The case in 5 Ohio, 398, is a peculiar one, and does not authorize the application in this case.

The defendant also holds under a sale for taxes; but, I suppose, he does not place much reliance on this part of his case; for the

thirty-five acre certificate was produced eight months, and the one hundred acre certificate, five years, after the date of his deed.

Application rejected.

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LESSEE OF JOHN H. WINDER AND SALLY WINDER v. LYNE STERLING.

Collector or treasurer's return of delinquent lands is sufficient, if verified by affidavit in the form prescribed by the statute.

When no paper is published in a county, it is sufficient to publish notice of a sale of lands delinquent of taxes, in a paper published in an adjoining county.

If the advertisement of a sale of lands for taxes is inserted in the auditor's records, the place of insertion is not absolutely material.

Sale of lands for taxes not affected by subsequent overcharge of tax.

THIS action of ejectment is brought to recover three hundred acres of land in the county of Hardin, being entry No. 12,296, in the Virginia military district.

The case is submitted to the court, upon an agreed state of facts, substantially as follows: Sally Winder, one of the lessors of the plaintiff, has a patent for the land in controversy, bearing date in 191] 1826. John H. Winder and Sally Winder are *husband and wife, and the title to the premises is in the said Sally Winder, unless the same has been legally transferred.

The defendant claims title in virtue of a deed from the county auditor of Logan county, the lands having been forfeited to the state for the non-payment of the taxes for the years 1826 and 1827, and sold in pursuance of the act of March 14, 1831, providing for the sale of such lands.

It is agreed that the lands were in every particular regularly forfeited to the State of Ohio, except that the plaintiff objects: 1. That it does not appear of record that the collecter in 1826, and the county treasurer in 1827, were sworn by the auditor to the correctness of the delinquencies returned by them for these years respectively.

2. That there is not a sufficient record of the advertisement of

the delinquent list previous to the sale of delinquent lands in 1827.

The parties respectively reserve the right to take exception to any acts which took place relative to the premises, subsequent to January 1, 1828.

STAUNTON, for the plaintiff, relied upon the following facts:

1. That there is no evidence that the county collector in 1826, or the treasurer in 1827, were ever sworn to the delinquencies by them returned for those years in which the demanded premises were included.

2. That there is no evidence that the Mad River Courant, in which the aforesaid delinquent list was published in 1827, was a newspaper of general circulation, either in the county of Hardin or Logan, and that it was not published in either of those counties.

3. That there is no note at the foot of the record of the advertisement aforesaid of the name of the paper in which the advertisement was published.

4. That the taxes subsequent to the forfeiture in 1827 are overcharged.

5. That the premises were entered on the duplicate for taxation and charged with taxes in the years 1824 and 1825, before they were patented.

He cited the following authorities as applicable to his view of the case: 4 Bac. 641; 4 Co. 74; Cro. Eliz. 584; 4 Cranch, 412; 11 Mass. 165; 14 Mass. 28; 2 *Mass. 154; 1 Mass. 87; 11 [192 Mass. 468; 8 Mass. 284; 3 Ohio, 234; 5 Ohio, 370, 458; 6 Ohio, 399; Wright, 766.

STERLING and GILBERT, for defendant.

Judge HITCHCOCK delivered the opinion of the court:

From an examination of the facts agreed, it will be perceived that the duties of the court, so far as this case is concerned, are confined within very narrow limits. It is admitted that these lands were properly forfeited to the state for non-payment of taxes, unless the record of the county auditor is defective in not showing that the proper officers were sworn to the correctness of the delinquencies returned by them on the tax duplicates of 1826

and 1827. And in not showing that the Mad River Courant, a paper published at Urbana, in the county of Champaign, in which the delinquent lists for the counties of Logan and Hardin were published in 1827, was a newspaper in general circulation in the counties of Logan and Hardin. At the time these lands were taxed, returned delinquent, and offered for sale, the county of Hardin was not organized, but attached to the county of Logan for judicial and other purposes.

We will inquire, in the first place, whether it sufficiently appears of record that the collector in 1826, and the treasurer in 1827, were sworn to the correctness of the delinquencies returned by them. It may aid us in arriving at a correct conclusion upon this question, to ascertain the leading object of the legislature in requiring this oath. The first section of the act of February 1, 1825, to amend the act defining the duties of county auditor, Chase's Stat. 1493, provides "that the county auditor, on receiving from the collector of taxes the receipt of the county treasurer for moneys paid by such collector into the county treasury, shall charge the treasurer with the amount thereof." The object of this section is, that the auditor may have a check upon the treasurer in the expenditure of the public funds, and have the means of calling that officer to an account or settlement.

Section 2 provides for a settlement to be made between the county auditor and county collector for the amount of taxes charged on the collector's duplicate for the current year. In making such settlement, the county auditor is authorized to take 193] from such *duplicate a list of such taxes as the collector has not been able to collect, describing the taxes delinquent as they are described on such duplicate; and is further required to note thereon the reason assigned by the collector why such tax could not be collected. This is what is denominated the delinquent list. It is to be signed by the collector, and he is required to testify to its correctness under oath or affirmation, to be administered by the auditor. For the amount of taxes in this delinquent list, the collector is entitled to credit; and hence the propriety of its being verified by oath. After deducting from the duplicate the amount of delinquent taxes, and the amount of fees for collection, the auditor is required to certify on the same delinquent list the balance due to the state, the balance due to the county, the balance due for road purposes, and the balance due to townships in

the county. It is made the duty of the collector to pay these several balances by the 15th day of January next thereafter. It is also made the duty of the auditor to record the collector's return, and then deliver the same to the collector, to be by him delivered over to the auditor of state. From a consideration of all these provisions, it is manifest that the leading object of the oath was to satisfy the auditor of the correctness of the return as laying a foundation for a settlement by the collectors with the several treasuries for which the moneys had been by him collected. Still, although this was the leading object, it was necessary that all these requisitions should be substantially complied with before the land could be forfeited to the state.

To prevent mistake in the collection of the public revenue, the legislature, at the same session in which the act above referred to was enacted, have, in section 39 of the act establishing an equitable mode of levying taxes, prescribed the forms to be used by the several officers concerned in this collection. Chase's Stat. 1486. Among others, the form of the delinquent list, of the collector's oath, and of the county auditor's certificate upon the list, are prescribed. The form of the oath is as follows: "I, C. D., collector of taxes as aforesaid, do solemnly swear that the foregoing list of delinquencies are, to the best of my knowledge and belief, truly stated, and that the reasons for returning such taxes delinquent as noted thereon do, as I verily believe, exist." An extract from the records in the auditor's office of Logan county, introduced in evidence, shows that these forms have been *literally pursued. [194 Although there is no explicit statement by the auditor that he administered the oath to the treasurer or collector, yet there is all the evidence of this fact, and the only evidence which the legislature have thought proper to require by the statute or in the forms prescribed. Whether these forms are the best that could be devised, it is unnecessary to inquire. They are prescribed, and so long as the revenue officers pursue them, nothing more can be required at their hands. In fact, an examination of the evidence adduced, can leave no doubt upon the mind but that the collector in 1826, and the treasurer in 1827, were sworn to the correctness of the delinquent list for those years.

It will be recollected that, by an act passed January 24, 1827, Chase's Stat. 1543, the office of county collector was abolished, and the duties of that office transferred to the county treasurer. Hence

the delinquent list of 1827 was verified by the oath of this latter officer.

Another objection to the forfeiture is, that the auditor's record does not furnish evidence that the Mad River Courant, in which the aforesaid delinquent list was published, in 1827, was a newspaper in general circulation, either in the county of Logan or Hardin, and that it was not published in either of said counties.

This record shows that the paper in which the advertisement was inserted, was published at Urbana in the county of Champaign, a county adjoinining that of Logan. It is made the duty of the auditor to have the publication made in a paper printed in the county, or in one in general circulation in the county where the land to be sold is situated. From the circumstance that publication was made in a paper printed in an adjoining county, it is reasonable to infer that none was printed in Logan county. In such case it is probable that a paper printed in an adjoining county would have more general circulation than any other. And in every case where there was no paper printed in the county where the land to be sold was situated, I apprehend it would be proper for the auditor to advertise in one published in the adjoining county, without stopping to inquire how general the circulation of that paper might be in the county where the land was situated. In this matter the law is directory to the auditor, and when he has exercised his discretion, we are disposed to believe, 195] in the *absence of all proof to the contrary, that he has done his duty.

It is next objected that there is no note at the foot of the advertisement of the name of the paper in which the advertisement was published.

The law requires that the advertisement should be inserted in the auditor's book of records. This was done. But the law further required that the auditor should certify at the *foot* of each record the name of the paper wherein the same was published. Chase's Stat. 1493. The name of the paper in which the advertisement was published, is noticed upon the record, but it is not done *exactly* at the *foot* of the record of the advertisement itself. It seems to me that this objection is too trifling to defeat even a tax title. If, in the course of business, the auditor, after recording the advertisement, should find it necessary to enter other matters in the record, before noting the name of the paper, or even if

the name of the paper should be inserted before the advertisement itself, the object of the law would be answered, the only object in view being to have it appear of record in what paper the advertisement is published. In the opinion of a majority of the court, the exceptions to the forfeiture in this case are not well taken.

It is not contended for the plaintiff but what the sale of this land was regularly made in 1831, provided the same had been correctly forfeited; but it is insisted that no title passed, because the taxes subsequent to the forfeiture were overcharged, and because the lands were entered on the duplicate for taxation and charged with taxes for the years 1824 and 1825 before the patent issued.

Whether the taxes were overcharged subsequent to 1827 does not clearly appear from the evidence. But even if it were so, we apprehend it could make no difference with the defendant's title. In consequence of the non-payment of the taxes of 1826–27, the land was forfeited, and thereby the title was vested in the state, to be disposed of as the wisdom of the legislature should afterward prescribe. A subsequent overcharge of taxes could not avoid this forfeiture or affect the title of a subsequent purchaser from the state.

By the act of February 18, 1804, levying a tax on land, Chase's Stat. 414, lands in the Virginia military district were subjected to taxation as soon as entered. How it was previous to that time, I will not undertake to say, not having *examined with a view [196 to ascertain. But since that time, I am not aware of any law exempting such lands from taxation. This land was entered in 1823, surveyed in 1824, and patented in 1826. In 1824, it was subjected to taxation. By the act to provide for the sale of forfeited lands, Chase's Stat. 1817, it is made the duty of the auditor of state to transmit to each county auditor a list of forfeited lands lying within such county, specifying the amount of tax due thereon for each year, including the year 1836, and for what years. Such list in 1831 was sent to the county auditor of Logan county, and the land now in controversy was charged with the tax of 1824 and 1825, as well as for the years subsequent to 1827. It was right under the law that it should be so, unless the taxes for those years had been paid, of which there is no pretense.

Upon the whole, the court are of opinion that under the agreed

state of facts, in connection with the evidence adduced, the defendant is entitled to judgment. We feel the less regret in coming to this conclusion in the present case, as it is possible that the law may have made ample provision for *femes covert* to redeem their lands, when sold for taxes, even after a forfeiture.

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JOHN M. FULLER *v.* SIMON PERKINS AND WM. ROBSON.

Where a purchaser of real estate misrepresents his means of payment, when making the contract, and is finally guilty of gross negligence in performing on his part, equity should not aid him by decreeing a specific performance.

THIS was a bill in chancery by a vendee of lots in the town of Akron, asking a decree for a specific performance against the vendor. It was reserved for decision here in the county of Portage.

G. POWERS, for complainant.

C. PEASE, for defendant.

Judge WOOD stated the case, and delivered the opinion of the court

The bill, in this case, was filed February 1, 1834, and states that the complainant and said Robson, on January 18, 1827, purchased of Perkins lots 174 and 175 in Akron, and took a certain contract which is set out in the bill.

197] *By this contract Fuller and Robson agreed to purchase the lots at three hundred dollars, and made, at the execution thereof, a payment of two hundred dollars, in a note against one *Beecher* and *Sloane*, and one hundred dollars by the 1st of July next, thereafter, with interest thereon; and for this last note they executed their joint and several note. They also agreed to erect on one of the lots a brick or stone house suitable for a tavern, to pay all taxes, and prosecute the building of the house, as their

means would permit; and when the walls of the house were up, the roof on, and the one hundred dollars paid, Perkins was to give a deed. The bill further states that the defendant, Perkins, has collected the two hundred dollars for his use; that in consequence of losses and failures of contractors, and Robson's pecuniary inability, he could not commence building the house until June 10, 1832, when he commenced preparing the foundation and procuring materials, and from thence till May 10, 1833, continued to prosecute the building, as his and Robson's means would permit, and would have finished the house, but was forbidden by the defendant, Perkins, on the aforesaid May 10, 1833. The bill states that the complainant has paid the one hundred dollars and has tendered the amount of all taxes, since the contract was executed, to said Perkins. That Robson, on September 26, 1833, sold all his interest in the land to the complainant. That Perkins, on May 10, 1833, commenced an action of ejectment against the complainant to recover the possession of the said lots. That the complainant has demanded a deed of Perkins; and that he should discontinue the ejectment—both of which the defendant, Perkins, refused. The bill prays for a specific execution of the contract or a compensation in damages, and that the action of ejectment may be enjoined.

The answer of Perkins admits the contract denies the collection of the two hundred dollars for his use, but states, before the money was collected, Robson was the sole owner of the note, and directed Wells, the agent of Perkins, and who made the contract for the sale of the lots, to collect the money and forward it to him in Pennsylvania; and that by letter of January 22, 1830, which directed the avails of the note to be remitted to him, Robson expressly abandoned the contract; and a copy of this letter containing such instructions and abandonment is contained in and made part of the answer.

*The defendant denies that anything of consequence to- [198
ward building a house in pursuance of his contract has been done by the complainant. The defendant admits he has commenced an action of ejectment as stated by complainant, and alleges that he has received but forty dollars on the one hundred. He admits that the complainant paid to his clerk seventy-seven dollars sixty cents, which the clerk had no authority to receive, but was induced to do so by the fraudulent representations of the complain-

ant, and which payment was after the contract had been forfeited by both the complainant and Robson. The answer also admits the tender of the amount of taxes of fourteen dollars forty-four cents, and avers that the defendant directed his agent, Wells, to refund the forty dollars and the seventy-seven dollars sixty cents, which he has offered to do, and is still ready to refund. The defendant denies all knowledge of any assignment by Robson to complainant of the contract, but insists, if made, it was fraudulent and after the contract was *abandoned*. The defendant states that the advancement of the town of Akron was the principal inducement to make the contract with the complainant, and the erection of a building for a tavern the most important consideration for the sale of the lots.

The answer insists that the complainant has been guilty of gross neglect, which, by his letter of January 14, 1828, he acknowledges, and that the excuses set forth in his bill for not performing his contract are frivolous and merely pretenses, and denies all fraud.

The complainant has filed a replication, and submitted to us the depositions of Carter, Mills, Jarvey, Viers, Babcock, Ayres, Sprague, and Hand. There is, however, but little in these depositions to aid him. They generally relate to his pecuniary inability to pay for the lot when his note became due, or to make any progress in the erection of the building. One witness, however, Viers, states that in 1827 he contracted with Fuller to make brick, and received a mare in payment; that Fuller went off to Pennsylvania and he heard no more of him until he was sued for the mare.

So far as I have been able to dissect the evidence in this case, it seems to be entirely with the defendant. Wells, who was the agent and made the contract, testifies that Fuller, the complainant, represented that he had a brother in New York able and willing 199] to assist him, and who had in his hands *seventeen or eighteen hundred dollars of his property, and that Robson was reported to be worth three or four thousand dollars, and that a belief in their means and ability to make the payments and build the house was the principal motive to make the contract. It is very evident that Wells was deceived, and that the complainant and Robson could, at the time, have entertained no well-grounded hopes of meeting their engagements. Wells testifies that Robson,

soon after the contract was executed, went to Pennsylvania, and the complainant followed him in the fall of 1827, without any preparation to build, otherwise than a contract with Viers for brick, and the balance of the one hundred dollar note was due in July before complainant left. Fuller returned in the winter of 1830, but Robson has remained absent. Wells says, in the early part of 1828, he notified Fuller and Robson that if they did not perform their contract it would be considered forfeited. In 1830 Fuller returned, and shortly after the witness received a letter from Robson, abandoning the contract, and directing the amount of the note against *Beecher* and *Sloane* to be sent to him, to which Perkins assented. Fuller did nothing toward building until 1833, when he commenced preparing for the foundation, when witness forbade him, and has frequently informed him the defendant considered the contract as abandoned and forfeited on the part of him and Robson, and that no more payments would be received. In the spring of 1832 Fuller offered to pay up the one hundred dollar note, which the witness refused, and referred him to the defendant, and gave him a memorandum of the amount, etc., and witness offered to refund to Fuller what he had paid, with interest, which he refused. In 1831 this witness states property began to rise in Akron. Fred. Rusman testifies he was a clerk for Gen. Perkins, and Fuller came there in the absence of Perkins and with the memorandum from Wells, and induced him to take the money due on the one hundred dollars, but Perkins would not sanction the act.

This, then, is substantially the case, and it is submitted for our consideration whether this contract shall be specifically executed, and it seems to me there are two grounds, either of which is sufficient to prevent the chancellor from an interference to compel its specific execution.

1. The evidence most clearly proves a gross misrepresentation of their means and ability to perform their contract, and *by [200 which they preyed upon the credulity of the agent, and induced him to enter into it. These representations were such that the agent had the right to rely on them. He could not ascertain their truth or falsity but by the most diligent inquiry in New York, where their means was said to be. This would occasion delay and inconvenience, and the law permits a man to rely on statements made by another under such circumstances. The representations

made by Fuller, the complainant, were *grossly fallacious*, and even a fraud and imposition on the agent, and the principal, Perkins, should not be bound by the contract, founded and executed upon them. 1 Mad. Ch. 204, 208, 209, 329–331.

2. The complainant has been guilty of gross negligence on his part, and to him equity will not lend its aid. Robson left Ohio soon after the contract was executed, and afterward expressly abandoned it, having made no payment nor performed any part of his agreement from that day to this. Fuller, the complainant, followed him out of the state in the fall of 1827, forty dollars only having been paid on the contract, and nothing is heard from him excepting by letter, in which he speaks of his embarrassments and inability to perform for *two years*, until he returns in 1830. He then does nothing toward building until 1833, when the land had risen in value, and he prepares for the foundation of the house. This is five years after the contract was entered into, nearly that after the payments became due, and this same work should have been commenced. A party, to entitle himself to a specific execution of a contract, must show himself eager, prompt, and ready to comply on his part.

The law is not made for the sleeping, but for the vigilant and watchful. Decree for complainant for forty dollars, seventy-six dollars and sixty cents, but without costs, and the specific execution of the contract denied. As to Robson, bill dismissed without costs.

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## Heirs of Smith *v.* Caleb Stark and others.

When, under a law of Congress, the patent issues for lands to revolutionary soldiers directly to the person who performed the service, or his heirs, no equitable claim can be sustained to the ownership of such lands, by a purchaser, without proof of sale, made in person or by any one authorized to sell.

This was a bill in chancery, adjourned from the county of Tuscarawas. The complainant alleged that in the year 1800 he 201] purchased from a broker in Philadelphia, for account of *himself and a partner, the warrant upon which the land in contro-

versy was located. This warrant was originally issued to Gen. John Stark, in part compensation for his revolutionary services, and the law providing for its appropriation forbade its being assigned, so as that a patent could issue to any other person than such as the warrant was issued to or his heirs. The bill alleged that the warrant was purchased of Franklin Stark, who was authorized to sell it. That the complainant, esteeming him the owner, procured its location, obtained the patent, and took possession of the land it covered. That he had held the possession and made improvements until ejected in 1834. That he had paid all the taxes, and that the grantee of the warrant had, by neglecting it, virtually abandoned his claim under it, and recognized the lawful ownership of the complainant.

The answers deny that General Stark had ever authorized F. Stark to sell, or had sold his warrants, and deny the authority of the brokers to sell them, insisting upon their right and upon the policy of the law that protected their interests against unadvised assignments.

The testimony was voluminous, but none was adduced showing a transfer of his right by General Stark, or an authority to any one to make sale of his warrants.

S. W. CULBERTSON, for complainant, maintained

1. The soldier performed a service for the government of the United States, for which he could support no action, but in equity was entitled to a compensation.

2. That the government of the United States, sensible of his rights, by its acts of 1796, etc., made provisions for him, by granting him a warrant for land. In doing this, the government paid him, only what, in equity, it owed him, and what it had induced him to expect.

3. That when the government granted him the warrant, it invested him with a right of which it could not, by any subsequent act, divest him but by his consent; he had paid for the warrant, and received it as legal evidence of his claim for the quantity of land specified in the warrant.

4. Having received the warrant, it became the absolute property of the soldier, as much as if the government had paid him by a check on the United States treasury; of that *warrant he [202 had as much right to dispose as if it had been a check.

5. Warrants issued to J. and A. Stark for the lands in the bill, and when the warrant of Archibald was issued, he was dead; he died without heir of his body and intestate, leaving a father and brothers; the father was his heir, as per answer. These warrants were delivered to General Stark, who gave them to his son Benjamin Franklin Stark, who sold them to complainant, by his agent, Thom, for three hundred dollars, received the cash, which was the then selling price as per Thom's deposition, John Stark and Mrs. B. F. Stark's depositions. By this act John Stark and his son B. F. Stark, divested themselves of all equity to this land, and their equity by the sale and receipt of the money vested in the complainant, the purchaser.

6. These warrants were considered but as choses in action, and passed as bank notes, with or without indorsement, and whether indorsed or not, in this case, the equity is the same, as there is proof of payment.

7. The warrants came to the hands of complainant by purchase, in 1800, and August 6, 1801, patents issued as in the bill set forth, and inured to complainant's possession, who purchased the right of Johnson, his partner, as per Johnson's deposition, and procured his quitclaim deed.

That complainant has been in possession ever since; paid the taxes and made improvements, which are a substantial benefit to the owner of the land.

From the facts as made out by complainant, it would appear that his equity is complete, unless the testimony of respondent shows a better equity, or that the law of Congress bars the complainant's right.

1. Respondents deny the sale or delivery of the warrants by General Stark to his son Franklin, and Franklin's sale to complainant, but the proof is complete against them.

2. He alleges that from the close of the revolution General Stark did no business.

General Stark died in May, 1822, and eight or ten years before his death, say in 1812 or 1814, as Caleb Stark alleges, he was appointed his guardian, owing to his alienation of mind; and yet he says that in 1817 Smith called upon him to say that he had purchased those warrants, and he, Caleb, offered to go with him to 203] his father to procure the necessary *information. This allegation of Caleb Stark, and the testimony of A. Gamble and

Rawell, go to prove that General Stark was capable of doing business when he gave these warrants to his son Franklin, who sold them to complainant in 1800.

3. Caleb Stark denies knowledge of the sale of these warrants, and yet admits that in 1817 Smith told him of it, and this was long previous to his purchase. His whole answer is false and contradictory in itself; he purchased with full notice. See John Stark's deposition.

4. Caleb Stark never looked after these lands till 1824. See his letters to Lovemore; and yet he says that at one time his father asked him how he was coming on about recovering his army lands.

5. If the act of Congress of March, 1800, had never been passed, there could be no difficulty as to the decree that ought to made.

6. It remains for complainant to surmount this difficulty, and he attempts it in this way: First, that the warrant vested an absolute right in the warrantee, which Congress could not after take from him; that he had paid a fair consideration for it; that he had a right to dispose of it as he pleased, and having sold and received a *bona fide* consideration for it, his equity becomes vested in the vendee; that the warrant, like a bond, was conclusive evidence of the holder's right, unless fraud or satisfaction was proven, none of which is attempted.

That Congress, being omnipotent in such cases, could have refused to issue their patent to an assignee, between them and whom there was no privity of contract, is admitted; but having, in compliance with their contract with the soldier, issued their patent to him, they could then have no further control over the patent or the patentee. The patentee then became the trustee of the vendee, and held the land for him, and it now becomes the province of equity to make him do equity. The complainant, in 1800, paid to the warrant holder and owner three hundred dollars, and the taxes ever since till very lately. John Stark in his lifetime, from 1800, when the warrant issued, till his death in 1822, never looked after this land; and why? Because he was an honest man, and knew he had sold it, and the purchaser had paid for it. Why did Caleb, the guardian, so long sleep upon the rights of his father? And why did he sleep upon the rights of the heirs afterward till 1824, when he discovered the value of the land and the prospect

204] *of a legal recovery? He was told by his brother John, who inherited a part of his father's integrity, that his father had no right to this land, and the reason why he had not. It remained for Caleb to sully the name of Stark.

But another difficulty may possibly be made. There was first a tract of country set apart by Congress to satisfy the soldier in a certain way and manner; and after the majority of soldiers' warrants were supposed to be classed and located, fifty quarter townships were selected from the military district to be divided up into one hundred acre lots, and patents were to issue exclusively to the soldier for these lots, notwithstanding any previous sale of the warrant by the soldier—a law apparently well calculated to make the poor soldier a rogue, and the present case is a strong evidence of it. How can this law constitutionally interfere with the rights of the parties? The warrants were the property of the soldiers; they sold them and received the payment. Will equity let them have both the money and the land? Surely not both. But this is not a controversy between General Stark and his vendee, but one between two claiming vendees. General Stark divested himself of his right in giving his warrants to his son; this son sold his right to the complainant, and now Caleb Stark claims by purchase from the heirs of General Stark. Is the equity of General Stark and the equity of his children the same? It is thought that the act of Congress had an eye solely to the soldier, to the laborer, and not to those who came after him; their rights were to be determined, as the rights of other citizens, except where the patent issued to the heir, which would not be done but by the production of the warrant, or on proper proof that it had never issued. This is a question between purchasers; and the maxim *qui prior est tempore potior est jure* is also a good maxim in equity, where the equity is like the present.

ATHERTON, for defendants:

Defendants contend the lands given to revolutionary soldiers, on account of military services, were a *bounty*, in consideration of fidelity in the performance of those services, and an encouragement to engage therein, not differing in principle from the case of soldiers in the French war, whose *bounty* in land was provided 205] for by the royal proclamation, 1763. L. L. *U. S. 30, 168, ed. 1817. The only distinction (besides personal application in

the latter case) is, that the former was prospective, the latter retrospective, and neither recognizing the privilege of assigning nor the right of assignees. The warrants were not, and being the *bounty* of the United States, could not, be issued as a *payment*, but were intended as a testimonial that the soldier was entitled to the land as a gratuitous and enduring memorial of his patriotism, and without reference to the length of the time of service, provided "he continued to serve until the close of the war, or was discharged by Congress;" and Congress expressly declared, that it would "not *grant lands to any person or persons* claiming under assignment of any officer or soldier." Resolutions 16, 18, 20, Sept. 1776, L. L. U. S. 168. An ordinance of July 9, 1788, authorized *warrants* to issue to assignees of soldiers, Ib. 169; but no act of Congress having made a *grant of land* to assignees of warrants prior to the location of the lands in question, excepting three hundred acres to Ithamar Canfield, by the act of May 10, 1800, Ib. 174; and that on condition "the transfers and powers of attorney were made out pursuant to the rules in such cases established at the war office;" the defendants contend that the right of General John Stark to the lands in question can not be affected by any supposed transfer or assignment; or if the above-mentioned act in favor of Canfield be construed to vest the right to the *land* in the assignee of the warrant, by virtue of the assignment merely, and to have that influence in other cases, then it is incumbent on the complainant to show in his bill, and prove the "rules established in such cases in the war office," and that assignment was made in conformity to them; neither of which is done in this case. The defendants contend that no other mode of transferring *land warrants* than such as had been ascertained by law could be valid to vest the equitable right to the land in any holder, and that the practice of transferring by delivery, had never been thus ascertained. If, however, it should be held that a *delivery of the warrants* was sufficient to transfer the equitable right to the land, defendants contend that in this case the fact that General Stark *did deliver or transfer them* not being proved, and in defendants' answer denied, can not be taken as true. The testimony on that subject is mere narration of reports. It only proves that the warrants came into market through the agency of B. F. Stark, and not *that General [206 Stark had authorized the act, or was even connusant of it.

The defendants contend that previous to the issuing of the pat-

ents, the interest of the warrantee could not be parted with by deed or assurance of conveyance only. Allen's Lessee *v.* Parish, 3 Ohio, 107. That no evidence of declarations of General Stark, that *he had given* the warrants to any one, or that he intended to do so, can be available to pass the *lands*, unless as corroborative evidence of his having made such *deed* or assurance, and in the case of its being lost, or in the possession of the adverse party, Ib. And even then, other evidence than the declaration of the co-heirs would seem necessary, Ib.; especially when, as here, no such *deed* or *assurance* is charged, proved, or pretended by complainant. Defendants contend that the military lands were always subject to the control of Congress, to direct the *manner* of location of warrants, or to suspend them altogether. That the law designating the territory on which to locate operates as, and is a grant to the soldier and his legal representatives, of his quantum of land; no matter whether in classes of four thousand acres or one hundred acre lots; that between government and the assignee of the warrant, there never was a privity of contract; that any claim of an assignee, without a legal conveyance or contract to convey the *land*, confirmed *after location*, is a fraud on the soldier and on the government, or rather on the *fund* for satisfying the resolution of 1776. That though *location* was first authorized in four thousand acre tracts, and a *patent* ordered by law to be *granted* to the *holder* or *locator*, yet, that the *law* did not recognize the *holder* or *locator* as the *grantee* of the land; that such patentee must, in equity, be held as the trustee of the soldier, whenever the soldier can designate the location of his warrant; a matter now, probably, very difficult, if not impossible in most cases, since the burning of the war office.

The defendants contend that the act of March 1, 1800, L. L. U. S 173, swept away the pretensions of all assignees of unlocated warrants, so far as the fifty quarter townships were concerned, not by invalidating contracts made *bona fide*, but by repealing all former laws in relation to the *manner* of *locating*. That it was competent for government to do so; for, until that time, after the first location, various acts were passed extending the time of location
207] to A. D. 1818, Id. 171, *without which they would have been barred, Ib. Id.; that by the act of March 1, 1800, besides providing for a new mode of location on the fifty quarter townships, the government made a grant (Allen's Lessee *v.* Parish) of the land

directly to all the soldiers whose warrants were yet unlocated. That the warrants, yet afloat by the true meaning of that act, proved the amount of the grant; or if no warrant had been issued, the amount would be ascertained as in the first issuing of warrants; or if the act can not be construed as making a specific grant, as above contended, the almost unlimited frauds committed on the soldiers and the fund by speculators demanded of the government a restriction. The rights of honest purchasers, it might be presumed, would be respected by the patentee and confirmed by deed, as in Smith *v.* Shaw, Sup. C. U. S., Jan. Term, 1834. But it could never have entered into the head of any but a rash speculator that a claim founded on no evidence of sale, no conveyance or assurance, in defiance of the voice of the law and the universal cry of fraud against him, would, in equity and good conscience, be confirmed, merely because he held the warrant, or could prove some long-forgotten tale of the intention of the soldier at some time to dispose of it in a particular manner; or by pretending, as in this case, that he and his partner had claimed the land, and that the one had released to the other! The defendants contend that all the acts and doings of the complainant, as set forth in his bill in relation to the lands in question, amount to no more than an attempt to set up a claim. He does not show that he ever applied to Gen. Stark for a title; nor does he, nor can he offer an excuse for the omission, or with propriety aver that he was ignorant of the residence of Gen. Stark; for his residence, like his fame, is a part of the history of our revolutionary struggle.

The defendants contend that even if, as between Gen. John Stark and complainant, equity and good conscience would decree for the complainant; yet, in this case, the decree must be for the defendants, as he purchased from the other heirs without any knowledge that Gen. Stark had ever given or intended to give the warrants to B. F. Stark. This knowledge is charged in the bill, denied in the answer, and only *seems* to be proved by the testimony of John Stark, the son; and his testimony given subsequent to conveyance of his share to the defendants, while the defendants' answer in this *particular is confirmed by nu- [208
merous letters to the defendants, and their answers to some, filed in this case at the request of complainant himself.

The defendants contend that they are not chargeable with laches in neglecting to prosecute their claim. The judgment at

law, which complainant seeks to enjoin, shows that for the last six or eight years he has been pursuing his claim. He contends that the existence of that judgment furnishes sufficient answer to that suggestion. But they contend that the complainant, in neglecting from the year 1801 to the year 1822, to apply to Gen. Stark, in his lifetime, for a conveyance, and neglecting for ten years longer to present his claim satisfactorily to a court of equity, evinces a consciousness of the entire rottenness of his pretensions, of which the court will necessarily take notice.

Judge LANE delivered the opinion of the court:

The first step in proof, which must be made by the plaintiff, is to show a lawful authority in the broker of Philadelphia to make the sale under which the plaintiff derives his title. For the defendants are heirs, holding the estate of their ancestor, from whom no equities should be exacted, except those which spring from a valuable and meritorious consideration. The proofs adduced to show this fact are voluminous, and it will serve no good purpose to repeat them; it is enough to announce that they do not show the authority to make the sale with sufficient certainty to lead us to invade the title of the heirs

Injunction dissolved.

Bill dismissed.

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209] *ZENAS KENT v. LUCIUS N. BIERCE.

Where the court order a second injunction bond to be given, which order is not substantially complied with, the first bond is not discharged.

THIS case was adjourned from Portage county.

OTIS, for plaintiff.

HITCHCOCK, for defendant.

Judge GRIMKE stated the case and delivered the opinion of the court:

This is a suit on an injunction bond, executed 29th June.

The plea avers that after the giving of this bond, the defend-

ants, by an interlocutory decree, were ordered to give another bond in substitution of the first, which order has been complied with. The replication denies this, and avers that it was ordered by the court that the injunction should be continued on the defendant (the then complainant), giving *further* bond, etc., and to this replication there is a demurrer. The case differs materially from the one in 6 Ohio, 336. There the demurrer was to the plea, and this admitted the fact that the second bond was substituted in the place of the first. It admitted it, provided it was well pleaded, and it was decided that it was well pleaded, that is, that it was in the power of the court to make an order of that kind. The question now presented is still narrower than it was in the former case. The fact that the second bond was not given in substitution of the first is admitted by the demurrer to the replication, and thus by a mere change of the pleadings, an entirely new aspect is given to the case. And it is, perhaps, fortunate that it is so, for in no other way can substantial justice be done between the parties, since, if the plaintiff were compelled to rely upon the new security, it would be productive of little or no advantage to him, as it is conditioned merely for the payment of the costs. If this was a mistake of the clerk, it is but fair that that mistake should not operate to the disadvantage of the plaintiff. But, however that may be, it is evident from the present state of the pleadings, that the new bond can not be considered as superseding the old one, and the demurrer, therefore, must be overruled.

Judge HITCHCOCK, having been counsel for defendant, did not sit in this cause.

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*CANDEE AND OTHERS *v.* KELSEY AND GOODLOE. [210

Where appearance-bail is given, the plaintiff waives his bond by accepting a plea and taking judgment, no special bail being entered.

THIS case was adjourned from Hamilton county, upon a case agreed.

STAR, for plaintiffs.

STORER and SPENCER, for defendants.

Judge LANE stated the case, and delivered the opinion of the court:

In August, 1834, the plaintiffs sued Kelsey, for whose appearance Goodloe became bail.

In October, 1834, a declaration *de bene esse* was filed against Kelsey, and no further steps by plaintiffs; at the December term, 1834, Kelsey filed his plea; at the same term the case was continued for want of special bail. At February term, 1835, the parties appeared, and judgment was rendered against Kelsey.

In February term, 1835, the present suit of debt was instituted upon the bail bond, and it is agreed that if the plaintiffs are entitled to judgment upon these facts, that it shall be entered upon the pleadings.

The point which is presented upon these pleadings is, whether a plaintiff, who has accepted a plea and taken judgment against a defendant, can afterward sustain action on the bail bond.

Nothing can be more abundantly settled in the English practice than that any step by the plaintiff beyond the mere filing a declaration *de bene esse*, is a discharge of the bail bond; that a declaration in chief, or the acceptance of a plea from the defendant, or the entry of a judgment against him, is deemed a waiver. 1 Tidd, 223; 1 Seld. 152; 9 Johns. 73; 7 Johns. 119.

It is insisted, however, that our statute innovates upon this practice, and contemplates the pursuit of the defendant in the original action to judgment, at the option of the plaintiff, at any time after the plaintiff has lost a term. The correctness of this opinion is not perceived; it is evident that upon a failure to perform the condition of a bond, the plaintiff may pursue the defendant, the sheriff, or the bail, at his election; but we abide by the whole body of precedents, in holding that the selection of one is a waiver of right against the other

Judgment for defendants.

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211] *PHILO SCOVIL *v.* C. M. GEDDINGS AND OTHERS.

Officers acting in good faith, under an order regularly made by town trustees for grading a street, are not liable for injuries sustained by individuals in such grading.

Scovil v. Geddings et al.

THIS cause was adjourned from the county of Cuyahoga. It was a special action on the case, for an injury to a lot of land and house owned by the plaintiff in the town of Cleveland. The alleged injury was committed by the defendants acting under an order of the trustees of the town for grading the streets. In making this grade, the earth was removed in front of the plaintiff's house and lot, by which he was put to inconvenience and loss; but no unnecessary damage was done, and no act performed except, in good faith, under the order of the trustees. The court charged the jury that the plaintiff was entitled to recover, and a verdict was rendered for the plaintiff for five hundred dollars damages. A motion was made for a new trial on the grounds of error in the charge and excessive damages.

ANDREWS and FORT, for defendant, and in support of the motion:

The action is not maintainable. It is a contradiction in terms to say that an action in tort can be maintained for a lawful act lawfully performed. In all declarations in case, it is or should be averred that the act which constitutes the foundation of the suit, was wrongfully or unlawfully done; and in Callender *v.* Marsh, 1 Pick. 435, Chief Justice Parker remarks that, "in no case can a person be liable to an action as for a tort, for an act which he is authorized by law to do." The motion shows that the act complained of in the case before the court was a lawful act.

The action is not maintainable, because the defendants are public agents, acting lawfully within their jurisdiction. This point was expressly decided in the cases of the Gunner and Company of the Glass Plate Manufacturers *v.* Meredith and others, 4 Term, 794; Steele *v.* Western Lock Navigation Company, 2 Johns. 286; Sutton *v.* Clark, 6 Taunt. 42; Boulden *v.* Crouther, 2 Barn. & Cress. 703; Callender *v.* Marsh, above cited, and Harmon *v.* Tappender and another, 1 East, 555.

In Boulton *v.* Crouther, it was decided by the court of king's bench that trustees under a general turnpike act, who were authorized to grade and repair roads, were not liable for *any [212 consequential injury resulting from an act which they were authorized to do. In delivering the opinion of the court, Chief Justice Abbott expresses himself as follows: "If the act done be an act which the trustees were authorized to do, the next ques-

tion is, whether any individual who has sustained some injury from the act done, can maintain an action at the common law; that he can not, is expressly laid down by Lord Kenyon and Justice Buller, in the case of the Plate Glass Company. It seems to me that the case is a distinct authority upon the point." Justice Holroyd remarks that "it would be absurd to hold that an action would lie against them (the trustees) for doing an act which they are empowered by act of Parliament to do." Mr. Justice Littledale takes a distinction between persons acting for their own benefit, and public agents acting for the benefit of the public. "I agree (he says) that a private individual must use his own land so as not to injure that of another, but the private individual acts for his own benefit, and ought not to obtain a benefit at the expense of his neighbor. But where an act of Parliament vests a power in trustees to be exercised by them, not for their own benefit, but for that of the public, and gives no compensation for damages resulting from an act done by them in the execution of that power, the legislature must be taken to have intended that an individual should not receive any compensation for the loss resulting to him from an act so done for the public benefit." It is confidently submitted that these cases settle the point, that this action is not maintainable against these defendants at common law, and that no authority can be found in which it has been decided that public agents are liable in tort for acts done by them within their jurisdiction, and where no negligence or malicious motive are imputed to them. The cases of Goodloe and Smith *v.* City of Cincinnati, Ohio, 500, 514, do not conflict with those above cited. There the court decided that where a public corporation acts illegally and maliciously, or illegally without malice, to the prejudice of an individual, an action in the case for damages may be sustained against such corporation—a doctrine which is not controverted here. If an action can be maintained at all against a corporation for the consequences of a lawful act, it is submitted that it should be in assumpsit upon a promise implied by law in consideration of benefit derived from that act to the corporation, and this was the opinion of Justice Littledale, above
213] *referred to. At any rate, if the court should be of opinion that in this case an action might have been maintained against the corporation upon the ground that the act complained of was done for their benefit, still it is respectfully submitted that it

should not extend to their agents, acting lawfully, and for whose benefit the work was not performed; that the rule should not extend beyond the reason which supports it, and that such an interpretation of the law, by putting an end to public agencies of this description, would be contrary to public policy and subversive of important public interests. If judgment is rendered against the defendants in this case, they can have no redress against the corporation. 2 Wilson, 133; 8 Term, 186.

Again, it is contended that the action can not be maintained, because, at the time the street was laid out, and the right to alter and grade it was acquired by the public, the plaintiff, or those under whom he claims, was paid for the interest of which he was thus deprived. When the land of an individual is appropriated as a highway, the public are bound to make him compensation for any injury he may sustain. The use of the highway, the right to alter, grade, and repair it, and the effect which the exercise of these rights may have upon land adjoining the highway, are all embraced in the estimate of damages, and these damages being once assessed, the question of compensation (while the public use and improve that highway in a lawful manner) is at an end; otherwise they might be compelled to pay for the privilege more than once.

Finally, the suit can not be maintained, because the statutes authorizing the improvements complained of, prescribed a particular mode of assessing damages and making compensation. It is conceded that where there is a common law remedy, and also a statute remedy, not inconsistent with it, either may be resorted to by the party aggrieved; but where (as in this case) there was no remedy at common law, and the statute prescribes one, the latter alone must be pursued. See, upon this point, the opinions of Justices Buller and Grose, in the case of the Plate Glass Company, 4 Dunf. & East, 794.

The act amendatory of the act incorporating the village of Cleveland (23 Ohio L. L. 321, sec. 2, and which is the law under which the work was done) appointed three persons to appraise the damage which had accrued or might accrue to the property of any person whatever by reason of the grading, *and to [214 assess the amount of such appraisal upon lands in the village according to the benefit derived thereto, from the improvements which might be or had been made—a provision which would be

defeated if a suit could be maintained in any other form; as in that event the debt must be paid from the general funds of the corporation, and not by a discriminating tax as contemplated by the act. The very object of this provision might have been to establish a uniform rule for the assessment of damages, and to relieve the corporation from a multiplicity of suits.

WHITTLESEY and NEWTON, for plaintiff:

In this action it is insisted, by the defense, that no action in tort can be maintained, because the defendants acted carefully. If we should admit that the defendants acted carefully, and that no injury accrued to the complainant, then no action could be maintained; but it can not but be admitted that the plaintiff has sustained an injury, and *that* by the advice and direction of those against whom this suit is brought, and the injury does not arise from the breach of a contract.

If the law under which the earth was pretended to be dug from the door of the plaintiff, does not repeal the common law, it is manifest that this is the appropriate form of action. By the common law, any one who committed an injury, or advised or directed it to be done, was liable to the party injured. This grading law (and this is a very appropriate term) directs what course may be pursued by the party injured. It does not thereby repeal the common law, but it is merely cumulative. We regard the common law as having the same influence over the acts done by the defendants as if no remedy had been pointed out by the *act* under which they profess to act. Whether they are agents or principals can make no difference if this action can be maintained at all.

Judge GRIMKE delivered the opinion of the court:

There is no question with regard to the authority of the trustees to execute this work. The act, 33 Ohio L. L. 220, expressly confers it upon them, nor is it pretended that the defendants in doing the act complained of, were not acting within the scope of this authority. Then the principle of law, that where in-
215] dividuals are exercising a power which the law has *given them they can not be made answerable for it in any form of action, applies It is a principle of universal application, and is absolutely necessary to the protection of all those in whom any public trust is confided. The case of Goodloe *v.* City of Cincinnati

does not contradict this position. There it was decided that when the corporation of a town acts *illegally* and *maliciously* to the prejudice of an individual, an action on the case for damages may be sustained against them. In Leader *v.* Moxton, 3 Wils. 461, a special action on the case was sustained against pavers for raising the street in the front of the plaintiff's houses, by which the passage and lights to the houses were obstructed. In the British Glass Plate Manufacturers *v.* Meredith and others, 4 Dunf. & East, 789, this case is denied to be law, and Lord Kenyon even doubts the accuracy of the report of it. From the language of Gould, who speaks of the defendants having *misdemeaned* themselves in the trust confided to them, and of having committed an enormous injury to the plaintiffs, it may reasonably be inferred that they had exceeded the powers committed to them, and as the abuse of an authority given by the law renders the party a trespasser *ab initio*, the case, even as it is reported, is reconcilable with the general principle of law. At any rate, if it is intended to carry any further meaning than this, it can not be considered as law, and it is contradicted by nearly the whole current of English and American authorities. The case last mentioned from Dunford & East was nearly the same as in Wilson. It was an action on the case against commissioners appointed by a paving act; and it was decided that neither they, nor any persons acting under them, were liable for any injury occasioned to the plaintiffs by altering and raising the street. Lord Kenyon said, "if this action can be maintained, every turnpike act, paving and navigation act, would give rise to an infinity of actions; some individuals suffer an inconvenience under these acts; but the interests of individuals must give way to the public welfare." Callender *v.* Marsh, 1 Pick. 418, was precisely the same as the case before the court, and it was there decided that "a surveyor has authority, by the statute, to dig down or raise a street, and if he does it with discretion, and not wantonly, a party injured can not maintain an action against him nor against any other person." In the case in Dunford & East, Buller said he was clear the action could not be maintained upon general principles, and he was *also of opinion that the [216 provision in the act for making compensation would also forbid the idea of any action being maintained. The provision for making compensation was nearly the same as in the act of March 7, 1835, amending the charter of incorporation of the town of

Cleveland. It will be observed that the indirect injury which may be done to private property by lowering or raising a street, does not come within section 4, of article 8, of the constitution of Ohio. Private property is not taken for public uses, but a damage or inconvenience only is sustained by private property. Ample provision, however, has been made by the law for remunerating the plaintiff, and if he does not choose to avail himself of it, he certainly can not succeed in this action. Infinite mischief would be the consequence if he could. No man could be found bold enough to engage in any public trust, if the law which invested him with authority were to be converted into a weapon of defense against himself.

As neither upon precedent nor upon principle, can this action be sustained, a new trial must be granted.

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DOE ET DEM. JOHNSON ET AL. *v.* WALTER TURNER.

A deed conveying lands is not to be impeached, by showing that one of the subscribing witnesses is incompetent to testify.

Where a trust deed conveys several tracts of land, and empowers the trustee to sell them together, or in lots, and a sale of the whole is made at once, without objection from the grantor, the sale is valid.

IN this case an agreed statement of facts is submitted on which the questions to be decided arise. Walter Turner was indebted to the Bank of Zanesville in the amount stated in the trust deed under which the plaintiffs claimed, and on the application of C. B. Goddard, Esq., the attorney for the bank, executed the deed which was prepared and signed by said Goddard, as one of the subscribing witnesses, he being a stockholder in the corporation.

That part of the trust deed which is connected with the case, is in these words: "And I do hereby expressly empower the said Charles C. Gilbert, his heirs and assigns, upon giving sixty days' notice of the time and place of sale, in some newspaper printed in said Coshocton county, to sell to the highest bidder, at public sale, for cash or credit, as my said trustee may deem best, without re-

serve and without appraisement, all of said land, or so much thereof as may be necessary, either *together* or *in lots*, and of the proceed," etc.

*In pursuance of the above power, the trustee published [217 the following notice: "That by virtue of a deed of trust executed to me by Walter Turner," etc., "I shall, on Monday, the 6th day of July next, between the hours," etc., "at," etc., "sell to the highest bidder, for cash, without reserve and without appraisement, all the right, title, and interest of the said Walter Turner to the following described pieces or parcels of land, situate," etc., minutely describing several lots and parcels.

The lands were sold under this notice, in *one* parcel. Turner was present at the sale, and knew the lands were sold in one parcel, but expressed neither assent nor dissent thereto.

It is agreed by counsel, if the trust deed is admissible in evidence, and the sale in *one* parcel is no objection to the sale, then judgment shall be rendered for the plaintiffs; otherwise, for the defendant.

R. STILLWELL, for the defendant:

In support of his objections to the deed and sale, cited 1 Day, 51–53, in note; 1 Ld. Raym. 505; 2 Strange, 1253; 7 Com. L. 199; 1 Burr. 417; Touch. 53–55; 5 Ohio, 190; 4 Johns. 216.

GODDARD and CONVERSE, contra:

Cited 31 Ohio Stat. 346, sec. 1; also act relating to wills, Id. 242; Smith' *v.* Chamberlin, 2 N. H. 440; Bank Muskingum *v.* Carpenter's Adm'rs et al. 7 Ohio, 21; Honeywood *v.* Peacock, 3 Camp. 196; 1 Ohio, 245, 350; Union Bank of Maryland *v.* Ridgeley, 1 Har. & Gill, 324.

Judge WOOD delivered the opinion of the court:

The first question for the consideration of the court is the objection to the trust deed, because, at the time of its execution, General Goddard, one of the subscribing witnesses, was a stockholder in the Bank of Zanesville. If this objection is sustainable, the deed is invalid to pass the legal title of the lands intended to be conveyed to the trustee for the security of the bank, and ought not to be received in evidence in support of a legal title in the plaintiff's lessors. In this action it is the legal title which is to be ascer-

218] tained. It prevails over all *equities, however strong, between the parties. The plaintiffs can not recover without it, and it is not conveyed by any instrument defectively executed. Our statute has prescribed the formalities to be observed in the disposition of real property, and they can not be dispensed with but at the imminent peril of losing our legal rights.

But is not this deed in conformity with the statute? This is admitted, in all respects, excepting that General Goddard was *interested* in the corporation for whose benefit it was made, when he subscribed it as a witness, and it was executed by Turner. If interested, however small that interest may be, the general rule of law excludes the witness from giving testimony. It distrusts him and declares him disqualified. But if it be necessary to sustain this deed, to call this subscribing witness, would the rule which excludes an interested witness apply? The party whose right it is to object on the ground of interest may waive that objection and the witness is then competent. He may call him himself, and he is competent; because if he testify for himself, who has the right to object? His evidence is against his own interest, and the more worthy of credence; and if called by the other side, whose claim it is his interest to support, and the objection of interest be waived, the law admits him to testify.

Ought this grantor, then, Turner, not to be considered as having waived all right to object to the competency of the witness?

In England, the grantee must prepare the conveyance and present it to the grantor for execution. We know of no such rule here. The grantor prepares his own deed. He calls his witnesses; they are selected by himself. He must then acknowledge its execution, and not until thus acknowledged, does he part with its possession by a delivery to the grantee. Every act, therefore, is the act of the grantor while the deed remains in his possession, and the first act of the grantee is the acceptance when finally delivered to him. The grantor, then, should not, it appears to us, be permitted to object to a witness selected by himself, and in whose integrity he had reposed confidence, to bear witness to his own acts. But aside from this course of reasoning, is this deed invalid? The statute, vol. xxxi, 346, sec. 1, requires the deed to be executed "*in the presence of two witnesses, who shall attest such signing and sealing and subscribe* 219] *their names to such attestation.*" Unless *the express provisions of this statute, or its plain inference, lead to the conclusion

that the witnesses to a deed must be *credible* and *competent* to prove its execution at the time of their attestation, and that such was the intention of the legislature, reluctantly, indeed, would this court adopt such an opinion? If such be the law, it is time to look around us and ascertain by whom our deeds bear witness. Who ever instituted an inquiry when a witness was called to attest a deed, whether he was *competent* or *incompetent to testify in a court of justice;* or whether persons might not subsequently be found who would impeach him for the want of character for truth; whether conviction for crime, or the want of a correct opinion of the providences of God, according to the notions of others, might not exclude him from giving evidence? Precarious, indeed, are our titles, if such is the principle to be established. For such question will most probably arise as frequently as the action of ejectment shall be resorted to, to establish a legal title. The words of the statute are, "*two witnesses who shall attest such signing and sealing.*" It is, then, at the time of the execution, that they are to bear witness that the execution of the deed was the voluntary act of the grantor, by subscribing their names to such attestation; not by proving its execution as competent and credible witnesses, half a century hence, in a court of justice. The plaintiff's counsel have very properly said that the statute is silent as to the qualities of the witnesses. It neither requires them to be competent to testify, white, credible, disinterested, of proper religious belief, nor innocent of crime; but leaves the grantor at liberty to select such persons as he sees proper. In the case of a will, the statute prescribes that the witnesses shall be *credible*, and its execution in the presence of any other than *credible witnesses* would not be a compliance with its requisitions.

The counsel for the plaintiffs have furnished us with the case of Smith *v.* Chamberlin, 2 N. H. 440. The opinion is given by the chief justice, Richardson, and appears to us fully to sustain us in our opinion of the law of this case, as to the validity of the trust deed. The opinion is founded on a statute of New Hampshire, of February 10, 1791 (1 N. H. Laws, 191), which contains this provision: "That all deeds or other conveyances of any lands, tenements, or hereditaments, lying in this state, signed and sealed by the party granting the *same, having good and lawful authority there- [220 unto, and signed by *two or more witnesses*, and acknowledged by such grantor or grantors before a justice of the peace, and recorded at length in the registry of deeds in the county where such lands,"

etc. "lie, shall be valid to pass the same without any other act or ceremony in law whatever." On this section of the statute, the chief justice says, "In the clause now under consideration, there is nothing which indicates an intention in the legislature to require that witnesses to a deed should be *competent* to prove its execution at the time they subscribe it as witnesses. We have been much at a loss to conjecture why two witnesses were in this instance required by the statute. Surely they were not intended to be placed round a grantor for the same reasons they are placed round a testator. The most plausible conjecture is, that it was intended to render the proof of the instrument more certain. If this were the object, there is good reason to suppose that the word witness, was, in this instance, used in the simple sense of spectators of the transaction. A witness competent at the time might in one hour become incompetent; and a witness incompetent at the time might in one hour become competent. All that could be done with this view, by the legislature, was to require that deeds should be executed in the *presence of two or more persons* who should put their names to the deeds as witnesses. It would have been idle to make the validity of the deed depend upon the incompetency of the witnesses, at a time when they could not be wanted to prove the execution of the deed."

The second and only remaining objection to the title of the plaintiff's lessors is, that the sale by the trustee was of the whole land in *one* parcel. We do not see on what principle this sale is invalid. The power to sell, it is true, is derived from the trust deed, and the authority there conferred must be pursued.

The deed authorizes the sale either *together* or *in lots*. The advertisement describes the property and gives notice that it will be sold at a certain time and place to the highest bidder for cash, but does not specify whether it will be sold *together* or *in lots*. It would seem, then, that either mode of disposing of the land at the sale was entirely within the discretion of the trustee *at the time of the sale*, agreeably with the power given by the deed. If there is any sub-
221] stantial *variance between the advertisement for the sale in the notice of its terms and conditions as conveyed to the community and those on which the sale was finally completed, we are unable to perceive it; and as Mr. Turner was present when the sale was made and did not express any dissatisfaction, we may naturally conclude the sale was then supposed to conform to the intentions

and wishes of the parties, and at least that he was satisfied therewith.

Judgment will be entered for the plaintiffs.

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STATE OF OHIO, FOR THE USE OF WM. W. IRWIN v. WM. CROOKS AND ANDREW SHAW.

When a sheriff, on the order of the court, gives additional security, either or both sets of bondsmen are liable to a party injured.

A sheriff, in office, is re-elected and proceeds to do business without giving new security. The securities upon the first election are not responsible for defaults committed under the second.

THIS case was reserved in the county of Fairfield.

It is an action of debt. The case made in the declaration is as follows: On March 19, 1825, in the county of Fairfield, the defendants and one Edward B. Thompson, then the sheriff of said county, by their writings obligatory, dated the said 19th day of March, bound themselves to the State of Ohio, in the penal sum of twenty-five hundred dollars, which writing obligatory, was and is subject to the following conditions, to wit: "That whereas the said Edward B. Thompson had before that time given bond and security for the faithful discharge of his duty as sheriff aforesaid, in the sum of five thousand dollars, as the law directs, and whereas the associate judges of the court of common pleas in and for said county, at the March term of said court in the year last aforesaid, did consider and require the said Edward B. Thompson to give his bond with security, in addition to his bond aforesaid, in the further sum of twenty-five hundred dollars; if then the said Edward B. Thompson shall well, truly and faithfully do and perform all and every of the duties required of him as sheriff of the county aforesaid, according to law during his continuance in said office, then the foregoing obligation shall be void and of no effect, otherwise," etc.

The declaration then avers as the breach of said contract, that afterward, on September 27, 1828, in the course of certain proceedings in partition which are specifically set forth, a sum of money amounting to sixty-five dollars and fifty-five cents, of right belong-

222] ing to said Irwin, came into the *hands of Thompson, sheriff, as aforesaid, in virtue of his said office, which money was not by said Thompson brought into court, nor has the same been paid to said Irwin by the said Thompson during his lifetime, nor by his administrators since his death, nor has the same been paid by the said Crooks and Shaw, securities of the said Thompson, sheriff, etc. Whereby an action hath accrued, etc.

To this declaration the defendants pleaded:

1. *Non est factum.*

2. That the said Thompson was at the annual election on the second Tuesday in October, 1824, duly elected sheriff of the county of Fairfield for the two years next succeeding. That having been commissioned, he did, on November 4, 1824, at Fairfield county aforesaid, enter into an official bond in the penal sum of five thousand dollars with B. Ruffner, Jacob Mussleman, Joseph Wilson, and George Berry, his securities, conditioned for the faithful performance of his duties as sheriff, which bond was approved by the court and deposited with the clerk. That said sheriff took upon himself his office on November 4, 1824, and continued therein for the term of two years. That during said term, to wit, on March 9, 1825, the associate judges of said county entered an order that said Edward B. Thompson, sheriff as aforesaid, should give additional bail in the sum of twenty-five hundred dollars within thirteen days. That the bond set forth in the declaration, executed by the defendants on March 19, 1825, was executed in compliance with said order; that since the execution of said bond, E. B. Thompson, Jacob Mussleman, and Benjamin Ruffner, three of the obligors therein named, have departed this life, leaving the said Joseph Wilson and George Berry their survivors; that said bond so executed by said Thompson, Ruffner, Mussleman, Wilson, and Berry, is now in full force, etc., and that the said surviving obligors are solvent and well able to pay the said sum of five thousand dollars, the penalty thereof, to wit, at Fairfield county aforesaid.

3. That at the annual election on the second Tuesday of October, 1824, said E. B. Thompson was duly elected sheriff, was commissioned and gave the several bonds as stated in the second plea. That at the annual election in 1826, said Thompson was again duly elected sheriff for the constitutional term of two years, and 223] on November 1, 1826, was duly *commissioned. That he failed to give bond as required by the statute, whereby his office

became vacant, and the duties thereof devolved upon Gothil Steinman, who was then the acting coroner of said county, and remained so vacant to the second Tuesday of October, 1828. That the several sums of money in the declaration mentioned, were received by the said Thompson in the manner therein stated, after the expiration of his term of office from the second Tuesday of October, 1824.

4. The same as the third plea, except that the election and commissioning of Thompson, in 1826, is not stated, with averments that the money charged in the declaration was received by him after his term of office had expired.

These three several pleas conclude with a verification. Two other pleas were filed, but as no question was raised upon them for the consideration of the court they are not stated.

To the three special pleas above stated the plaintiff demurred generally, to which demurrer there is a joinder.

IRWIN, in support of the demurrer:

Relied upon section 1, of article 6, of the constitution, which provides that sheriffs and coroners "shall be elected at the time and place of holding elections for members of the general assembly; they shall continue in office two years, if so long they behave well, and until their successors be chosen and qualified," as showing the tenure of the sheriff's office; and insisted that the law requiring sheriffs to give bonds conditioned for the faithful discharge of official duties, must be construed with reference to the constitutional provision. That such being the condition of the bond, the securities must be holden until a successor to the sheriff, for whom they have become bound, shall be chosen and qualified.

BRAZEE, for defendant, in support of the first special plea, insisted:

That upon a fair construction of the law authorizing the associate judges to require additional securities of a sheriff, such additional securities ought not to be made liable until the first bond entered into was exhausted. If that was sufficient *to cover [224 all the defalcations of the officer, no additional security was necessary; and if such additional security was given, to make them liable before the first bond was exhausted, was to treat them as original securities, which could not have been the intention of the law.

In support of the third and fourth special pleas, he argued that the contract of a surety is to be construed strictly, and is not to be extended by implication beyond the fair scope of its terms. 5 Pet. Cond. 728; 3 Saund. 415, note 51.

The office of sheriff being biennially elective, and the term for which Thompson was elected, and in which he was serving when the bond was executed, had expired prior to the receipt of the money in the breaches of the declaration mentioned; therefore the defendants are not liable to pay it. 13 Saund. 412; 4 Dallas, 282; 4 Hen. & Mumf. 208; 5 Pet. Cond. 737; 2 Maul. & Sel. 363; 2 Bing. 32; 8 Mass. 275; 6 East, 507; 2 Ohio, 334.

HITCHCOCK, J., delivered the opinion of the court:

The act "defining the duties of sheriffs and coroners in certain cases," passed February 25, 1824, and which was in force at the time the cause of action in this case is supposed to have accrued, requires that these officers shall give bond within ten days after they have received their commission, to the State of Ohio, with two or more securities to be approved of by the court of common pleas of the proper county, in any sum not exceeding twenty thousand dollars, conditioned for the faithful discharge of the duties of their respective offices; and the court authorized, at any time during the continuance of the officer in office, to require "further and additional security, as they may deem necessary." Chase's Stat. 1351. The bond now in suit was given in pursuance of this latter provision of the statute; and the question presented by the demurrer to the second plea is, whether such further or additional securities can be made liable for the default of the sheriff until the bond first executed is exhausted. Before the sheriff can proceed to discharge the duties of his office, he must execute a bond with security conditioned for the faithful discharge of those duties. The amount is discretionary with the court, provided the same does not exceed twenty thousand dollars. But if, at any time, in the opinion of the court, further security is necessary, as may often appear to be the case, the court has a right to require it. This is a provision of law well calculated for the se-
[225] curity of the public, and *ought, in all cases, to be resorted to when there is the least apprehension that the first bond is not sufficient, either on account of the limited amount of the penalty or of the inability of the sureties to respond in that amount. If

a second bond is required and executed, the condition is the same as in the first, and the obligors are equally bound with those in the first, for the same conduct of the sheriff, although perhaps not to the same extent. For neither can be bound beyond the amount of the penalty of the bond by them severally executed. A breach of the condition of one would be a breach of the condition of the other.

As, however, different bonds have been executed, and by different obligors, they can not be joined in the same suit. This furnishes no reason, however, why a person who has sustained an injury by the misconduct of a sheriff may not have his action upon either bond, as to him shall seem most proper. We incline to the opinion that he may thus have his action, and therefore that his plea is not a bar to the plaintiff's suit. Whether, after a recovery against one set of securities, and money made, these would have a claim for contribution against the others, it is not necessary now to determine.

The third and fourth pleas are substantially the same, and raise the question whether the securities of a sheriff are holden for a period beyond that for which he had been elected when the bond was executed. It would seem clear, upon a bare statement of the proposition, that they are not. No principle is better settled, perhaps, than that securities shall not be bound beyond the scope of their undertaking, and that the obligation resting upon them shall not be extended by implication. To sustain this position, without quoting authorities, I shall barely refer to those cited by counsel for the defendants. Notwithstanding this principle is well established, we have no inconsiderable difficulty in coming to a conclusion in this case. This difficulty arises from an apparent conflict between the constitutional and statutory provisions upon the subject. I say apparent conflict because, from a careful examination, I am satisfied there is none in reality.

The first section of article 6 of the state constitution provides that "there shall be elected in each county one sheriff and one coroner, by the citizens thereof, who are qualified to vote for members of assembly. They shall be elected at the time and place of holding elections for members of assembly. *They [226 shall continue in office for two years if they shall so long behave well, and until successors be chosen and duly qualified: *provided*, that no person shall be eligible as sheriff for a longer term than four years in any period of six years." This section prescribes

the times at which sheriffs shall be elected, and by whom, but it does not prescribe the qualifications of the individual who may be elected, nor is anything required of him before entering upon the duties of his office, except that, like all other persons elected or appointed to offices of trust or profit under the authority of the state, he shall take an oath of office. It prescribes also the term of office; it is two years. And he is allowed to continue in office until his successor is chosen and qualified. He shall not, however, be elected for a longer term than four years in six. The design of permitting him to hold even until a successor was qualified, undoubtedly was that there should be no vacancy for the reasonable time that it would take to have the successor notified of his election, commissioned, and qualified. Counsel for the plaintiff seem to suppose that if the person elected to succeed a sheriff in office should not qualify, that the incumbent might hold even without limitation of time, and in this way defeat the spirit of that part of the constitution which limits the term of service to four years in six. Does it follow, because the sheriff is an officer known to the constitution, and the time, place, and manner of his election is prescribed in that instrument, that the legislature can not legislate upon the subject? We apprehend not; and so it was held in the case of State of Ohio ex rel. Uriah Loomis v. L. Moffitt, 5 Ohio, 366. The legislature have not the power to say that a sheriff shall be elected for a longer or shorter period than two years, or for more than four years in six. They have not the power to change the qualifications of electors voting for this officer, or to say that he shall not hold his office until his successor is chosen and qualified, because, in so doing, they would explicitly violate the constitution. But they have the power to provide in consequence of what acts of the officer, or of the neglect of what duties the office shall be considered vacant. They have the power also to prescribe the duties of the office, for this is not done by the constitution itself. They have the power also to prescribe the qualifications necessary to render a man eligible to the office, and to prescribe the necessary qualifications 227] to be taken after a person is elected, before he *shall proceed to discharge the duties of the office. If they provide that in consequence of the commission of certain acts, or the omission of certain duties by an incumbent, the office shall be considered vacant, they have the power to direct what officer shall succeed that

incumbent, in the discharge of the duties of that office, until a sheriff can be regularly elected and qualified. All these things, and many others, may be done by the general assembly, and still the constitution would not be violated, because the legislation would not be inconsistent with it.

In pursuance of the powers vested in the legislature, that body has acted upon this subject It has prescribed the duties and qualifications of sheriffs. For the security of the public and of individuals, this officer, after his election, and before entering upon the duties of his office, is required to give bond with security conditioned for the faithful discharge of those duties. This bond is a thing unknown to the constitution; it is a creature of the statute. And in order to ascertain the extent of the liability of the obligors, it is necessary to have resort to this statute.

The act of February 25, 1824, defining the duties of sheriffs and coroners, Chase's Stat. 1351, in the first section, requires a sheriff within ten days after having received his commission, to give bond with security, to be approved of by the court of common pleas, conditioned for the faithful discharge of the duties of his office, and upon failure to give the bond within the time prescribed by law, "he shall be taken and deemed to have resigned his said office." The same section authorizes the court of common pleas to require further or additional security, and upon the failure of the sheriff to give this additional security, the court is authorized "to declare the office of such sheriff vacant, and proceed accordingly."

By section 8, it is made the duty of any sheriff, the term of office for which he was elected having expired, to deliver over all writs, prisoners, etc., "to such person as may have been elected and qualified to discharge the duties of sheriff, or if no such person shall have been so elected and qualified as aforesaid, then to the coroner of said county," etc. The same section provides, that "during the time the office of sheriff shall be vacant in any county, the coroner thereof shall be bound to perform all the duties, and be vested with all the powers of sheriff of said county." In effect, when the sheriff *elect does not qualify, the coroner becomes [228 successor to the former sheriff. His successor has been elected, but not having qualified, the law declares the office vacant, and when vacant, the same law declares that the coroner shall act as sheriff.

That the same individual shall have been re-elected can make no difference in the case. The constitution has prescribed the term of office. It is two years. When he is re-elected, he must be again commissioned, and within ten days thereafter, he must execute the bond, and upon failure so to do, "he shall be taken and deemed to have resigned his said office." Having resigned the office of sheriff, with what propriety can he still discharge the duties of the office under a former election?

With this law before them, what would the securities of a sheriff, when about to execute the bond, suppose was the extent of their undertaking? Nothing more than that he should faithfully discharge the duties of his office during the term for which he was elected. By adverting to the constitution, they would find this term was two years, and until a successor should be elected and qualified. The constitution requires, that at the end of two years, a successor shall be elected, and the law requiring the bond which they are about to execute, provides, that if this successor fails to qualify, the office of sheriff shall be held to be vacant, and the coroner shall succeed to discharge its duties. They would be led to the conclusion that their obligation, at the furthermost, could not continue beyond ten days after a successor had been commissioned. This seems to a majority of the court to be the common-sense construction of this statute, taken in connection with the constitution, and that it is not within the scope of the undertaking of the securities of a sheriff, that they shall be bound for his performance of the duties of his office beyond the term for which he is elected when the obligation is entered into.

This view of the subject is sustained by the following cases: Commonwealth *v.* Daynton, 4 Dallas, 282; Commonwealth *v.* Fairfax et al., 4 Hen. & Mumf. 208; United States *v.* Kirkpatrick, 9 Wheaton, 720; Farrer & Brown *v.* United States, 5 Pet. 373; Proprietors & Co. of the Liverpool Water-works *v.* Atkinson, 6 East, 507; Lord Arlington *v.* Merricke, 3 Saund. 412; Thompson *v.* Young and Wife, 2 Ohio, 334.

229] *These cases are all somewhat analogous to the case now before the court, and the case of the Commonwealth *v.* Fairfax and others peculiarly so. That was an action against the sureties of a sheriff upon his official bond. The statute of Virginia provides, that "every person commissioned and qualified as sheriff shall be continued in office one year after his qualification, and

*may*, with his own consent, and the approbation of the executive, be continued for two years, and no longer, unless by some accident or impediment, a succeeding sheriff shall be prevented from qualifying, in which case the preceding sheriff shall *continue to act till a successor be duly qualified.*"

Alexander White had been appointed sheriff of Jefferson county, and the defendants were his securities. The default for which the suit was brought happened in the second year of his sheriffalty. For this year he had not given bonds.

The court decided that the defendants were holden only for the first year of his appointment, and as the defalcation happened afterward, they were exonerated.

In the case now under consideration, the third and fourth pleas show that Thompson was elected sheriff in October, 1824, and that for the faithful performance of the duties of the office for the term for which he was then elected, these defendants executed the bond now in suit. He was re-elected in 1826, but gave no bond, consequently, under the law, the duties of the office devolved upon the coroner. Although Thompson continued to discharge the duties of the office, he was not sheriff *de jure*, but merely *de facto*. It was during this period that the moneys of the plaintiff came into his hands, and payment of these moneys was refused. This not being within the time for which these defendants were bound for his faithful performance, they can not be made liable for his default.

These pleas are a bar to the action; the demurrer must be therefore overruled, and judgment rendered for the defendants.

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*Lewis S. Møller and Eleanor Møller *v.* Isaac Flowers. [230

A justice of the peace has jurisdiction in a case for a nuisance to real estate where the damages are under one hundred dollars.

This cause was adjourned from Perry county.

Orton and Cusac, for plaintiffs.

Irwin and Lovet, for defendant.

Judge GRIMKE stated the case and delivered the opinion of the court:

This is a writ of error to the common pleas of Perry county. It was an action of trespass on the case for an injury to land, and originated before a justice of the peace. The declaration describes the defendant as a tenant of the plaintiffs, and the injury set out was, in its character, a nuisance. The jury found a verdict for the plaintiffs. The court of common pleas arrested judgment on the verdict, and gave judgment for the defendant; to reverse which, the writ of error was sued. Thus the single question presented is, whether the magistrate had jurisdiction. The act of March 14, 1831, extends the jurisdiction of justices of the peace to actions of trespass on real estate. There is no reason why we should limit the term trespass to trespass *vi et armis*, where it is a general term, and comprehends actions of trespass on the case, as well as of trespass *quare clausum fregit*. There is nothing in the act which signifies such an intention. On the contrary, the object of the legislature seems to be, to give a remedy for an injury committed upon the land without any discrimination as to the form of the remedy which should be used. Indeed, I apprehend there could be no doubt about the matter, if the term trespass *vi et armis* had not, in common language, usurped the almost exclusive appellation of trespass. But this is only because the other action may be designated more briefly by the term action on the case. They are both legally and technically actions of trespass, and, as I before remarked, the object of the legislature seems to have been to give the remedy where an injury to the land has been committed. In Nichol *v.* Patterson, 4 Ohio, 200, it was determined that a justice of the peace had no jurisdiction of an action for a nuisance to land. Section 62 of the judiciary act declares, that in the action for a nuisance, if the jury on the trial of the issue or on inquiry 231] of damages, shall find or assess the *damages under five dollars, the plaintiff shall not recover costs. Here the action for a nuisance is by necessary implication withdrawn from the jurisdiction of a magistrate. "Upon a different construction, on an appeal by either of the parties, the plaintiff could not recover costs unless the jury assessed the damages to five dollars. This would be the only exception to the general rule, that where the matter in controversy is within the jurisdiction of a justice, the costs, what-

ever the amount assessed, should follow the damages." On the whole, we are of opinion there was error in the opinion of the court below in arresting the judgment.

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JUSTIN KING AND WIFE *v.* NICHOLAS LONGWORTH.

Upon a mortgage to secure a debt due in installments, payable at different periods, equity does not interfere to enforce payment, until the whole amount is due.

THIS cause was adjourned from the county of Hamilton.

FOX and WRIGHT, for complainants.

V. WORTHINGTON, for defendant.

Judge LANE stated the case, and delivered the opinion of the court:

In December, 1821, King and wife mortgaged certain tenements to Longworth, to secure the payment of a debt of two thousand dollars, fifteen hundred dollars of which was payable in eight successive annual payments, and five hundred dollars in twelve years, with interest payable annually. In February, 1833, Longworth instituted his suit in chancery to obtain payment. In August, 1833, a final decree was rendered, in which a sale was directed, to pay the whole amount unpaid, including the five hundred dollars which had not become due. A sale was made in September, when the present bill of review was filed, and further proceedings stayed. The common pleas sustained the defendant's demurrer, from which the plaintiffs have brought the case to this court by appeal.

The question it presents is, whether in proceedings to enforce a mortgage payable in installments, it is competent to embrace, within the scope of the decree, a sum of money not due at the time of its passage, but to become due before a final distribution of the money?

*It is the well-settled practice of chancery to sustain a bill [232

to enforce the payment of debts secured by mortgage, and payable by installments, before all the installments are due. 1 Johns. Ch. 617; 1 Paige, 648; 2 Paige, 303; 1 Bibb, 144; see likewise 12 Serg. & Rawl. 240; 9 Mass. 298; 5 Pet. And where installments fall due between the filing of the bill and the final decree, they may be brought before the court by supplemental bill, or even without, if the facts sufficient appear upon the pleadings and proofs, and they may be embraced within it. But no judgment or decree can be rendered upon rights not yet accrued, and no presumption should be raised that a debt not yet due will not be paid. The decree, therefore, is irregular in finding the amount, composed in part of the sum of five hundred dollars, not payable until the December subsequent. The account should be taken of the amount then due, and a sale directed of so much as might be necessary to pay it. If the property be not divisible, the whole might be sold, and the residue, when brought into court, might be appropriated according to equity and the rights of the parties in a case made on motion, or petition, or supplemental bill.

There is another irregularity in this decree, though perhaps not sufficient to reverse it. The sale is directed absolutely, without any time being given to the mortgagor to make payment. A time should be appointed for this purpose, and the sale ordered in the event of failure.

The decree is reversed, and the case remanded to the Supreme Court of the county for further proceedings.

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BETHEL W. HEWSON *v.* SAFFIN AND SMITH.

In replevin, where issues are made upon different and inconsistent pleas, a general verdict for the defendants upon all is bad. The jury should find whether they base their verdict on the right of property, or the right of possession.

RESERVED in Hamilton county.

This action was instituted to recover possession of divers articles of property enumerated in the process and declaration. The defendants pleaded: 1. *Non detinet*, with notice of special matter.

2. That at the time of said detention, the goods and chattels were the property of the defendants. 3. That they were the property of James Saffin, one of the defendants. 4. That they were the property of Benjamin *Smith, the other defendant; and 5. [233 That they were the property of Samuel D. Flagg. On these several pleas, issue was joined, and the cause submitted to the jury on the last circuit, in Hamilton county, and the following verdict returned: "We, the jury, find for the defendants, and assess the damages at eleven hundred and forty-one dollars and twenty-five cents."

The counsel for the plaintiff filed a motion for a new trial: 1. Because the verdict is against the evidence. 2. That the damages are excessive. They have also filed a motion *nisi* in arrest of judgment for insufficiency in the verdict, and ask that a *venire facias de novo* may be awarded. These motions were reserved for decision in this court.

STORER and SPENCER, for plaintiff:

MORRIS and DRAKE, for defendants.

Judge WOOD delivered the opinion of the court:

The motion for a new trial must be overruled. We have not the testimony which was submitted to the jury. There was much of it, both from witnesses called to the stand and contained in depositions which were read on the trial. This evidence has, in a great measure, faded from our recollection, and leaves us to be guided in our action by what we can call to mind of our impressions at the time. If we do not err, the plaintiff claimed title to the property by bill of sale from Samuel D. Flagg, and the defendants by virtue of several executions in favor of Nathan Urner and others, which they, as constables, had levied on the property while in Flagg's possession. The judges who tried the cause, from the testimony then adduced, were left with the strong belief that the bill of sale from Flagg to the plaintiff was in fraud of creditors, and, as against them, void. If such were the fact, the defendants had the legal title to the property; and its value, with the addition of interest, from the time of the service of the writ, as shown by the evidence, was not too highly estimated by the jury.

We are, in the next place, asked to arrest the judgment for in-

sufficiency in the verdict, and to award a *venire facias de novo*. Section 7 of the act regulating writs of replevin, 29 Stat. 129, enacts, "that in all cases, upon issue joined, when the jury shall 234] find for the defendant, they shall *find whether the defendant had the right of property in the goods, or the right of possession only, at the commencement of the suit; and if they shall find either in his favor, they shall assess such damages as they think right and proper." Under this statute, the jury ought most clearly to specify the ground on which the assessment of damages is made; otherwise the court can not determine whether the damages are excessive or not. They might be excessive, if the right of possession, and not excessive, if the right of property, was found in the defendant; for, in one case, he would be divested of the temporary use, and in the other of the property itself. In the former, he should receive damages for the detention, and, in the latter, for the full value of the property. But can this verdict, on any legal principles, be sustained? It is a general verdict for the defendants, and finds *all* the issues in their favor. 1. That they did not wrongfully detain the plaintiff's property. 2. That the goods and chattels were the property of *both* the defendants. 3. That they were the property of Saffin, *one* of the defendants. 4. That they were the property of Smith, the *other* defendant. 5. That they were the property of *Samuel D. Flagg*. Here, then, are four special issues—each inconsistent with the others—and the jury find the right of property in *both* of the defendants, in *each* and in a *stranger*.

These issues can not all be truly found for the defendants; such a state of things can not exist in law or ethics. What issues then are truly and what untruly found? The verdict does not answer the inquiry, and must leave the court in doubt on which to render judgment, for the plaintiff or defendants. The jury should pass on all the issues made up between the parties. Their verdict should be clear and intelligible, so that the court may ascertain from its terms what judgment to render. 5 Ohio, 238. In Stearns *v.* Barrett, 1 Mass. 169, 170, Judge Story says, "If there be a material repugnancy in the verdict, it is not competent for the court to decide which is the truth of the case; and if it were otherwise, there is no authority to substitute its own opinion for that of the jury. In such case, the repugnancy *will be fatal*. A verdict which finds two inconsistent material facts is *void*, and can

not be a foundation for a legal judgment." This authority is decisive of this case. The judgment must be arrested, and a *venire de novo* awarded.

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*HESTER WEST, ADM'X OF JOHN WEST, *v.* SAMUEL PICKERSIMER, OTHERWISE CALLED SAMUEL B. HYMER. 235]

**In fixing the operation of the statute of limitations, the term "beyond sea," means out of the state.**

RESERVED in the county of Clermont.

This is an action of debt commenced on August 6, 1833, and in the declaration it is alleged that the indebtedness accrued on April 10, 1820.

The defendant pleaded two pleas:

1. The general issue.

2. That the cause of action did not accrue at any time within six years before the commencement of the suit.

Issue is joined upon the first plea, and to the second the plaintiff replied that the cause of action accrued before June 1, 1824, and at the time of the accruing thereof, the said John West was not a resident of the State of Ohio, but of the State of Virginia. That the said Hester West took letters of administration in the State of Virginia; and that neither the said John West during his life, nor the said Hester West since his death, were at any time within the State of Ohio previous to the commencement of this suit.

To this replication the defendant demurs generally.

STRAIT, for plaintiff.

FISHBACK, for defendant.

HITCHCOCK, J., delivered the opinion of the court:

The question submitted is, whether the plaintiff's replication is a sufficient answer to the defendant's special plea in bar. By the replication, the fact relied upon to avoid the statute of limitations is, that neither the plaintiff nor her intestate were ever within

this state prior to the commencement of this suit, and it is insisted that she is within the exception of that statute. According to the decision of the court at the present term, in the case of Haxlet et al. *v.* Critchfield, the limitation act of 1810 must govern this case. By that act there is an exception in favor of those persons who are "within the age of twenty-one years, insane, *femes covert*, imprisoned, or *beyond sea*," at the time the cause of action accrues, and they are allowed to sue at any time within the respective period specified after the disability is removed. Chase's Stat. 655.

It has been repeatedly decided by the Supreme Court of the United States, that the expressions "beyond sea," "*out of the* 236] **state*," are analogous. 3 Cranch, 174; 7 Cranch, 525; 3 Wheat. 541; 11 Wheat. 361. In conformity with these authorities, we have uniformly so held upon the circuit, when called upon to give a construction to our acts of limitation.

The plaintiff, by her replication, shows herself within the exception or saving clause of the statute, and is entitled to judgment on the demurrer.

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BARZILLA SMITH *v.* RANCIL A. MADISON.

Nice technical objections to an affidavit for bail are to be received with circumspection, and if not made upon the return of the process, they are to be disregarded.

THIS cause was adjourned from Hamilton county.

FOX, for plaintiff.

STRAIT, for defendant.

Judge GRIMKE stated the case, and delivered the opinion of the court:

This is a writ of error to a judgment in the Hamilton common pleas. The suit was brought by the defendant in error against the plaintiff in error. The *capias* was returnable August, 1834, and was accompanied by the following affidavit: "Rancil A. Madison, the above plaintiff, states on oath that the above defendant,

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B. C. Smith, is justly indebted to him in the sum of sixteen hundred dollars, and that he has sustained damage in the above suit to that amount. R. A. Madison. Sworn and subscribed this July 8, 1834, before me, Isaiah Wing, J. P." But the writ described the defendant as Brazilla, instead of Barzilla Smith. A motion was made on February 29, 1836, to set aside the *capias*, on the defendant filing common bail. Did the court below err in refusing this motion? The practice in the English courts with regard to the form of the affidavit to hold to bail has been exceedingly fluctuating until within a few years, and this may seem remarkable, as an act of Parliament has directed the manner in which it shall be made. In Moultley *v.* Richardson, 2 Burr. 1032, where the affidavit was, that defendant was indebted in such a sum as he computes it, the motion that the defendant might be discharged on *common bail, was overruled. The court seemed to think [237 that objections of this sort had gone far enough already. In Jennings *v.* Martin, 3 Burr. 1447, the affidavit was, that the defendant was indebted in such a sum as appears by agreement; it was alleged to be a settled fatal objection. Lord Mansfield said, *if* it was a settled point, it must be adhered to; but he confessed he was not satisfied with the reason for it. It appears that, notwithstanding the extreme nicety and strictness which had been observed, seemed to be authorized by the express words of an act of Parliament, yet that enlightened judge disapproved of it. And there is no solid reason why we should give our sanction to it. It is also contended that J. P. is not a sufficient designation of the official character of the person who took the affidavit, and that the defendant was described by a wrong Christian name. If there be anything in these objections, and it would, perhaps, not be easy to prove that there is; suffice it to say, at any rate, that the period of time which elapsed from the return of the writ to the time when the motion was made (more than eighteen months), amounts to a waiver of any such right if it ever existed. Indeed, this is an answer to all the objections which have been made.

There is no error in the refusal of the court to entertain this motion.

LYNE STERLING, JR., FOR THE USE OF MINOR, *v.* JOHN KIOUS.

The holder of a note payable to a payee named in it, or bearer, is held to be the owner prima facie, and he is not called to prove that he purchased.

THIS cause was adjourned from the county of Marion upon the motion of the defendant for a new trial.

STERLING, for plaintiff.

KERR, for defendant.

Judge LANE stated the case, and delivered the opinion of the court:

The plaintiff complains of the defendant for, that he made his promissory note, and delivered it to J. J. & S. R. Minor, thereby promising to pay to them or bearer three hundred and twenty-238] one dollars and fifty-six cents and interest, on or *before March, 1835, which period has elapsed; that the said J. J. & S. R. Minor have delivered the same to the plaintiff, of which the defendant had notice, by which he became liable to pay the same, and in consideration thereof promised, etc.

The case was tried by the jury upon the issue of *non assumpsit*, and the plaintiff produced the note, without any proof of the consideration upon which it came to his hands. The jury were instructed by the court that the production of the note was sufficient proof of his right to recover, and they rendered a verdict in his favor. The defendant moves for a new trial, because no proof of consideration for the transfer was offered, and likewise in arrest, because the declaration contains no averment of any such consideration.

The authority to show the necessity of this averment and proof is found in 11 Ohio, 228, where it is said by the court that "it must be stated by the plaintiff as a part of his title, and proved at the trial that the note was delivered for a valuable consideration, or acquired in the usual course of business." In our opinion these requisitions are sufficiently satisfied in the case before us. We have examined the precedents of declarations in suits upon notes by the bearer, and find the substantial averments are con-

tained in that before us, 3 Chit. Pl. 15, 16, 29; and we hold the plaintiff producing the note is presumed to be the lawful holder, and may recover without further proof, unless it be shown that he acquired it fraudulently, or under suspicious circumstances. It would form an inconvenient and unnecessary restraint upon the negotiations of checks and notes, which are circulated like cash, to require the holder to furnish other proof than the production of the paper to enable him to sustain a suit.

Motion overruled.

Judgment for plaintiff.

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ELIZABETH COOPER *v.* WM. D. COOPER.

A divorce granted in Indiana precludes an application for divorce and alimony in Ohio.

PETITION for divorce, reserved in the county of Clermont.

Judge HITCHCOCK stated the case, and delivered the opinion of the court:

The ground upon which this application for divorce is *founded is, that the defendant has treated the petitioner [239 with extreme cruelty; that he has willfully absented himself from her for more than three years; that he has been guilty of adultery, and that he has married another wife. The petition also discloses the fact that the defendant, who is a resident of Indiana, has applied to the proper judicial tribunal in that state, and has, by the determination of that tribunal, been divorced from the petitioner. The prayer of the petition is for divorce and alimony.

Case submitted without argument.

The question to which the attention of the court is called in the present case, arises upon the face of the petition. Before this court can proceed to dissolve a marriage contract, there must be proof that there is such a contract subsisting. If it is shown by the petitioner by proof, that there is no such contract, there is nothing upon which the court can act. In this case, it is stated in the petition that the defendant has been divorced from the petitioner in the State of Indiana, and it is not shown but that the

proceedings were perfectly regular and fair. By the statutes of Indiana, it seems that decrees for divorce in favor of one of the parties operates as a complete dissolution of the contract, and from thenceforth both parties are as completely liberated from the obligation of the same as if it never had been solemnized. The effect of the divorce is the same as in our own state. And if, under our laws, upon the application of the husband, a divorce should be decreed, it can not be held that a subsequent application by the wife would be sustained. It is apparent that the petitioner in this case is already freed from the obligations of the marriage contract, so far as human laws can release her; of course, there is no ground upon which this court can interfere, and for this cause the petition is dismissed.

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240] *JOSEPH TURK *v.* THE STATE OF OHIO.

Where an indictment contains two counts for the same offense, one good, the other defective, upon a general verdict of guilty, judgment may be given on the valid count.

If twelve grand jurors agree in finding an indictment, it can not be invalidated by showing misconduct of one of the fifteen jurors, nor can inquiry be made upon what grounds any one of the twelve jurors concurred in the finding.

A plea, impeaching the conduct of a grand jury, and alleging facts in contradiction to the journal of records, can not be maintained.

THIS cause was adjourned from the county of Montgomery.

LOWE, for the state.

SCHENCK and OING, for plaintiff in error.

Judge WOOD stated the case, and delivered the opinion of the court:

This is a writ of error to reverse the judgment and proceedings of the court of common pleas of the county of Montgomery.

The plaintiff was indicted for an assault with intent to murder; and on being arraigned, moved the court to quash the indictment,

which motion was overruled. This decision, although assigned for error, is abandoned by counsel.

The plaintiff then filed two special pleas in bar: 1. That the indictment was brought into court and presented by only fourteen grand jurors, one of the panel not being present to concur in or dissent therefrom, but wholly absent from the court and his fellow-jurors.

2. That Geo. Parsons, who was one of the grand jurors by whom the presentment was made, did not examine or hear any witness, nor inquire touching either or any of the several allegations of the indictment, but concurred therein without any proof or inquest whatever.

To these special pleas the counsel for the prosecution demurred. The court of common pleas sustained the demurrer. The plaintiff in error then plead not guilty to the indictment, was tried, and convicted; a motion for a new trial was made and overruled, and the plaintiff sentenced to imprisonment in the penitentiary.

The first assignment for error, not abandoned by counsel, is that the second count in the indictment is defective in this, that it does not state with sufficient certainty on whom the assault was made. The averment reads as follows: "Jos. Turk, etc., on the first day of June, etc., one Robert Moore, in the peace, etc., then and there being, feloniously, maliciously, willfully, and unlawfully, did make an assault." It is Robert Moore who is here averred to have made the assault, and not upon him that the assault was made. The defect is, without doubt, *a clerical omission, and although [241 the intention of the pleader can not well be misunderstood, it is not expressed, and is, nevertheless, a fatal objection to the count. Criminal prosecutions are conducted on principles *stricti juris*, and the law requires the indictment or count to be certain to a certain extent, in every particular, and there must be no intendment arising on its face to the contrary. The first count in the indictment is, however, substantially for the same offense. That count is good, and saves the prosecution; the rule of the common law being different in criminal from what it is in civil cases, and when there is one good count in an indictment, permitting judgment to be given on that count.

The next and remaining assignment to be considered is, that the court below sustained the demurrers to the special pleas. The questions arising here are more difficult of solution, and we

have not been without our doubts as to the opinion at which we have arrived. We think there are no matters pleaded which constitute a legal bar to the prosecution. Pleas in bar, says Jacob, 5 Law Dict. 179, go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: A former acquittal, a former conviction, a former attainder, or a pardon; and the reason why pleas in bar are so limited in diversity of matter in the English courts, in criminal cases, probably arises from the fact that there, as well as here, the general issue opens the door for the introduction of any matter, which, if pleaded, would bar the prosecution. It is believed no precedent can be found in judicial history of pleas similar to these on this record. The first plea is, in substance, like the second, with this exception, that it avers fourteen grand jurors only were at any time present to inquire, find, or present the indictment. This averment is not, however, sustained by the record; the record shows that fifteen grand jurors were sworn, and found and presented this indictment. If it be said the allegation in the plea is admitted by the demurrer, the answer is, that a demurrer only admits what is well pleaded: It does not admit that which is expressly proved otherwise by the record.

The second plea states that George Parsons, one of the grand jury, was not present at the finding of the indictment, did not hear any witness, nor examine nor inquire touching any allega-
242] tion of the indictment, but concurred without any *proof or inquest whatever. The oath of a grand juror requires him to "diligently inquire and true presentment make of all such matters and things as shall be given" him "in charge, or *otherwise come to*" *his* "*knowledge*, touching his present service," etc. The grand inquest is not usually composed of men learned in law. They are controlled by no technical rules of evidence. They must act according to the dictates of their own judgment and discretion, and whether a fact be proved by a witness, or disclosed by a fellow-juror, or from their own knowledge exists, it is their duty to present it to the court. They ought not to act rashly, nor without sufficient ground to believe, as the accusatory tribunal, in the existence of the fact they present. The grand jury are under the direction of the court, may be instructed by the court, and advised by the prosecuting attorney on matters of law. Of

the facts, they *alone* must determine. The court neither keeps their consciences nor can control them in finding facts, when intending honestly to discharge their duty. The grand jury, fifteen in number, must all consult, deliberate, and inquire sufficiently to satisfy themselves of the truth of their investigation, but twelve only need concur in finding the bill. Suppose, then, a juror steps out, and on his return to his fellows is informed they have agreed to find a bill, and the testimony is disclosed to him, or he is, perhaps, in his own bosom and his conscience, satisfied, is not every requisition of the law fulfilled? We incline to that opinion. But aside from this, can these matters be reached in this way by plea in bar to the indictment? If so, it might also be alleged in bar that the grand jury had not sufficient testimony, or admitted that which was improper, and our discretion and judgment usurp the place of theirs, when they are a co-ordinate, it is true, but, so far as facts are concerned, an independent branch of the criminal tribunals of the country.

There is, however, another and still more fatal objection to these pleas. They contradict the record; and it is a principle of law, familiar with all, that a record is proved by itself, and is of such validity that it can not be proved *per notiora*, and no fact can be averred against it. The record shows a grand jury found the bill of indictment on their oaths. The intendment and legal effect and presumption is, that it was found on proper evidence, with due deliberation, and by the concurrence of twelve of their number. A case might probably be imagined where the court should interfere, and would, on motion, quash *an indictment [243 for the misconduct of the grand jury, and would punish them for a contempt of court and violation of duty. The common pleas refused to sustain a motion under such circumstances; and were the testimony embodied in a bill of exceptions, we might possibly correct such error here. But no such case is presented.

The judgment and proceedings of the common pleas are affirmed with costs.

## James O. Bowles v. The State of Ohio.

An indictment upon the general provisions of the statute, for an assault with intent to commit a rape, need not specifically characterize the person upon whom the assault was made.

This case came before the court on a writ of error to the court of common pleas in the county of Montgomery, made returnable to the Supreme Court of the county of Franklin, and reserved for decision in bank.

Crane and Schenck, for plaintiff.

Lowe, for the state.

Judge Hitchcock stated the case, and delivered the opinion of the court:

The record shows that the plaintiff in error, at the August term of the court of common pleas, 1836, was arraigned and tried upon an indictment containing three counts. In the first count he is charged with having committed a rape "in and upon one Eliza Johnson, *a child*," in the peace being. In the second count he is charged with having assaulted the same person, with intent to commit a rape. In this count the person assaulted is described as "Eliza Johnson, a child;" and in the third count he is charged merely with having committed an assault upon the said Eliza Johnson.

To this indictment the defendant pleaded not guilty.

The jury found that the defendant was guilty as charged in the second count of the indictment, and not guilty as charged in the first count.

After verdict the defendant moved in arrest of judgment upon the second count of the indictment, and assigned the following reasons:

244] 1. Because the indictment contains no *averment negativing the excepting clause of the statute, "them, daughter or sister," etc.

2. Because the indictment, in describing the person upon whom the offense was committed, does not employ the language of the

statute, using the word *child* alone, instead of the descriptive statutory word, *female child.*

3. Because of general uncertainty.

This motion was overruled, and the defendant adjudged to three years' confinement in the penitentiary.

To reverse this judgment the writ of error is brought, and the errors assigned are in substance the same as the reasons in arrest of judgment.

The question, then, to be decided is, whether the second count of this indictment is sufficient in law. That count is in the following words: "And the grand jurors aforesaid, for the county aforesaid, upon their oath aforesaid, do further present and say that the said James O. Bowles, late of the county aforesaid, on August 21, 1836, with force and arms, at the township of Dayton aforesaid, in the county aforesaid, in and upon the said E. Johnson, a child, in the peace of God and of the State of Ohio, then and there being, an assault did unlawfully make, and her, the said Eliza Johnson, a child, then and there did beat, wound, and ill-treat, with intent her, the said Eliza Johnson, a child aforesaid, violently, forcibly, and against her will, then and there unlawfully and feloniously to ravish and carnally know, to the great damage of her, the said Eliza Johnson, a child, as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

In this count the offense seems to be specifically set forth, and whatever of uncertainty there is, it is fully supplied by reference to the previous part of the indictment. The principal exception taken is, that the individual upon whom the offense is committed is not described as "a *female child.*" The legislature, in prescribing a punishment for the crime of rape, have divided the offense into two classes, and graduated the punishment accordingly. By section 4 of the act for the punishment of crimes, 29 Stat. 136, it is provided that if any person shall have carnal knowledge of his daughter or sister, forcibly and against her will, the person so offending shall be confined in the penitentiary, and kept at hard labor during *life; and by section 5, that if any [245 person shall have carnal knowledge of any other woman than his daughter or sister as aforesaid, forcibly and against her will; or if any male person of the age of seventeen years and upward, shall carnally know and abuse any female child under the age of ten

years, with or without her consent, every person so offending shall be punished by imprisonment in the penitentiary at hard labor not more than twenty nor less than seven years. The first count of the indictment in this case is framed under the last preceding clause of the statute, and had the defendant been convicted under that count, there might be some difficulty in the case. If the intention was to indict under the last clause of section 5, it would seem to be proper to describe the person upon whom the offense was committed, as being a female child under ten years of age, and the offender as being a male person over seventeen years of age. If under the first clause, then, to describe the person upon whom the offense was committed as being other than the daughter or sister of the offendor; but whether it would be indispensably necessary, it is unnecessary now to decide. The defendant was found not guilty as to the first count, and our attention is called to the second, under which he was convicted. This is framed under section 17 of the act for the punishment of crimes. 29 Stat. 138. This section enacts that if any person shall assault another with intent to commit a rape upon the person so assaulted, every person so offending shall be held guilty of a misdemeanor, and shall be punished by imprisonment in the penitentiary not more than seven nor less than three years. This is a distinct offense, no way connected with those specified in sections 4 and 5. Whether the person assaulted be the sister, or daughter, or a stranger, is immaterial; or whether she be an adult or a child, in legal contemplation, the offense is the same. The only question is, whether a child is a person; and of this, I apprehend there can be no doubt. In truth, it was altogether unnecessary to describe the person assaulted as being a child, and this part of the indictment might be regarded as surplusage. It does not, however, vitiate the proceedings.

The judgment of the court of common pleas is affirmed, with costs.

*CHARLES A. REPPLIER AND OTHERS *v.* ORRICH AND PENDLETON, TIBBATTS, MORRIS, AND GROSS. [246

An assignment of a debtor's effects, for the benefit of such creditors as may come in within one year and agree to take a pro rata proportion, is invalid.

THIS was a suit in chancery, reserved from Hamilton county.

STARR and CHESTER, for plaintiff.

MORRIS and DRAKE, for defendants.

Judge LANE stated the case and delivered the opinion of the court.

Orrich, one of the firm of Orrich & Pendleton, in settling the accounts of the firm, acquired three notes of hand from Gross, indorsed by Tibbatts, which, on May 5, 1834, he assigned to Morris, in trust, to pay the proceeds of one, when collected, in discharge of their debt to the Bank of Pennsylvania, "and to pay the avails of the other two to such of the creditors of Orrich & Pendleton as within one year from the date of the agreement should become parties thereunto, and consent to take a *pro rata* assignment." A covenant to this effect was made between Orrich & Morris; no schedule of the names of creditors or of the amount of debts was annexed; but one creditor has become a party to the assignment, and it is not shown at what time.

The plaintiffs having recovered judgment against Orrich & Pendleton at the August term, 1834, bring this bill under section 15 of the act regulating the practice in chancery, charging that no creditor at that time had become a party to the assignment, and claiming it to be fraudulent and void, ask the avails of the notes to be appropriated in satisfaction of their judgments.

The answers assert that the provision in the assignment, that the avails of the notes should be paid to such creditors as should come in within a year and accept a *pro rata* distribution, was inserted by mistake and released by him as soon as discovered. As this averment does not respond to the bill, and as no proof of its truth is offered, it must be taken as not true; the case therefore presents the question whether this feature in the assignment, postponing

the distribution for a year and withholding the property from the power of creditors for this period, does not impress a fraudulent character upon the transaction.

247] *It is right for a debtor, in failing circumstances, to provide for the equal distribution of his property among his creditors by assignment to a trustee; and it may be necessary and proper for the trustee to suspend the distribution for the time required to investigate the extent of debts. But for the assignee to prescribe a fixed time, longer than is apparently necessary for this purpose, within which no distribution is to be made, and then to direct the payment, not of all his creditors, but such only as make themselves parties to that assignment and consent to accept a *pro rata* share, enables him to seclude his estate for a limited period from the satisfaction of his debts, and thus hinders or delays his creditors. If he may suspend for a year, he may for a longer time, and it would be difficult to assign limits to such power. Although, in the present case, the parties contemplated nothing but an honest and equal distribution, we can not sustain a transaction so liable to abuse, and so directly against the policy of the law. 5 Ohio, 294.

A question might be raised, whether a creditor instituting proceedings under this section of the statute, acquires a privity, or whether the property is to be distributed among all the creditors. The statute of February, 1835, is designed to secure such equal distribution; but these proceedings were commenced before this statute, and it has been the settled practice on the circuit, to regard bills in chancery, filed under section 15 of the act of 1831, as securing a preference to the plaintiff.

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STEVENSON ET AL. *v.* AGRY ET AL.

A debtor's assignment for the benefit of preferred creditors, imposing no terms, and exacting no delays, is valid

THIS cause was adjourned from Hamilton county.

MORRIS and DRAKE, for plaintiff.

CHASE, for defendant.

Judge LANE stated the case, and delivered the opinion of the court:

This is a suit in chancery, by which the plaintiff seeks to set aside an assignment of property made by Agry to his trustee, in trust, for creditors.

*On June 6, 1834, Agry, by an indenture tripartite, con- [248
veyed to Greene certain property, consisting of stock in a distillery, enumerated in a schedule, upon the following trusts: 1. To pay the expenses of the assignment, and of the management of the trust. 2. To pay the wages of a workman in the distillery, and certain debts which Greene, the trustee, held against him. 3. To distribute the residue ratably among all the remaining creditors of said Agry, who shall become parties to this indenture, and shall prove their claims to the satisfaction of the assignee or arbitrators. 4. After paying the aforesaid claims, to pay over the residue, if any, to Agry. The remaining provisions of the assignment prescribe the mode of executing the trust, which is to be finally closed in eighteen months.

The plaintiffs are judgment creditors of Agry, who claim that this trust is fraudulent and void, and seek to distribute it among all.

No actual fraud is admitted or shown, and the case depends upon whether the assignment be constructively fraudulent, as against the policy of the law.

Whenever a debtor seeks, by assignment, to impose terms and conditions upon his creditors while providing the means of payment, or place his property where it can not be applied in payment of debts, or to suspend the legal remedies of his creditors against his property or himself, the law adjudges the conveyance fraudulent. In Jordan *v.* Ellis, where the benefits of the assignment depended on the release by the creditors of all further claims, it was pronounced an unjust condition, and it was declared void. In Replier *v.* Orrich, Pendleton et al., decided this term, in which the distribution was to be delayed a year, by the terms of the assignment, to afford time for creditors to come in, it was adjudged that it could not be sustained, because these terms created the delay of a year, during which the property of the debtor was withheld.

But this assignment contains none of these features. It is the act of a creditor who takes his debtor's property into his hands, to pay his own debt, and hold any residue for those to whom it

belongs. It imposes no terms upon which its advantages may be obtained; it delays no legal rights; it suspends the payment of debts no longer than necessary to convert the property; the phrase "becoming a party to this indenture," means nothing more, than 249] a readiness of the creditor to accept *the distributive share; and the direction to give the residuum to the debtor infuses no new feature into the trust, beyond what the law would imply without it. It seems, therefore, nothing more than the exercise of the legal right of a debtor to prefer one creditor to another, and the creditor thus preferred, reaps no other harvest than the law secures to the vigilant.

Bill dismissed.

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JAMES KUDER *v.* HENRY CRONICE.

A party to a wager is not compelled to testify in an action brought by an informer under the statute, to recover the penalty.

THIS case was adjourned from the county of Seneca.

It was a penal action founded on a bet upon the result of an election, and brought in debt under the provisions of the gaming act. The defendant, Cronice, and Eli Dresback, made a wager on the presidential election, in 1832, of three hundred dollars. Dresback lost, and paid the money to Cronice, to recover which the plaintiff, as common informer, brought this suit. On the trial, Dresback was called as a witness for the plaintiff; he expressed his unwillingness to testify, and was objected to by the defendant. The court overruled the objections and required him to give evidence. He testified accordingly, and the jury rendered a verdict for the plaintiff. The defendant's counsel moved for a new trial, assigning two grounds:

1. It was error to compel the witness to testify.

2. That this description of wager is not prohibited by the statute.

Upon these assignments, the motion was adjourned here for decision.

RANSON and BOALT, for plaintiff.

COFFINBURY, for defendant.

Judge GRIMKE delivered the opinion of the court:

Section 12 of the statute declares, that "if any person, guilty of any of the offenses enumerated, shall be called upon before a grand jury, or in any court of justice, to testify on behalf of the state, the witness shall be compelled *to give all the facts in [250 evidence, and shall not be indictable or punishable for any of the offenses so by him disclosed." Dresback was required to testify in neither of these cases, and it is the statute alone, which, invading the general principles of evidence, has created this species of testimony in any case. That no man shall be compelled to testify where that testimony may lay the foundation for a criminal prosecution against himself, is a principle well established and well understood, to which we can admit no exceptions but such as the statute has made. It is evident, then, that the facts disclosed by this witness implicate himself, and that they might be instrumental in procuring a conviction against him. The law declares he shall be a witness for the state alone, and in that case humanely protects him against the consequences of his testimony. It protects him in no other case.

It was, therefore, error to compel him to testify in this case, and for this error a new trial is awarded.

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JAMES ANDERSON v. STATE OF OHIO.

An indictment for aiding to pass a forged paper must set forth that the accused knew it to be a forgery.

THIS was a writ of error to the court of common pleas of Stark county, made returnable to the court in bank. The case was this:

Anderson, the plaintiff in error, was indicted in Starke county, for aiding and abetting a person, calling himself George Stevens, to utter and publish, as true and genuine, a certificate of deposit in the following words:

"COLUMBIANA, BANK OF NEW LISBON, *May* 25, 1836.

"John Mendenhall has this day deposited seven thousand four hundred dollars, for the use, and subject to the order of himself and return of this certificate. R. W. SNODGRASS, *Cashier*."

Which certificate was fraudulently altered from four hundred dollars to seven thousand four hundred dollars.

The indictment contained two counts, and the material allegations of both were, in some words, as follows:

"And the grand jurors do further find and present that 251] *James Anderson, late of the county of Stark aforesaid, on the seventh day of June, in the year eighteen hundred and thirty-six, at Stark county aforesaid, did aid, abet, and procure the said person, calling himself George Stevens as aforesaid, to utter and publish the altered, false, forged, and counterfeited certificate of deposit, contract, and promise, for the payment of money as aforesaid, the said uttering and publishing as aforesaid, being an offense made criminal by a law of the State of Ohio aforesaid, contrary to the form of the statute," etc.

Upon the trial of this indictment, the defendant was found guilty, and sentenced to confinement in the penitentiary; to reverse which sentence this writ of error was brought.

The errors assigned are stated in the arguments of counsel.

GOODENOW, for the plaintiff in error:

There are but three points embraced in the assignment of errors, in this cause, which I deem it necessary to argue; and to these I shall say but few words.

1. Can an *aider*, *abettor*, or *procurer* be indicted, tried, convicted, and sentenced, without any proceeding being first had against the principal? If the law or practice is settled in this state on that point, I am as yet unadvised of it. In England, by the *common law*, aiders and abettors were indictable as principals in the second degree; and they must be proven on trial to be actually present, or constructively present; *that is*, at hand, so that they could afford aid and assistance to the principal in the execution of the plan of operations. But *accessories*, before or after the fact, could only be indicted and *punished* after the conviction of the principal. A procurer is an accessory before the fact.

Our statute for the punishment of crimes provides, 29 Stat. 142, sec. 34, "that if any person shall aid, abett, or procure any other person to commit any one of the offenses," etc. Who, then, let me ask, is an "*aider*, *abettor*, or *procurer*," in the meaning of the act? Shall we resort to the *common law* for a *definition* of the crime? Suppose we do, where do we look for the mode or man-

ner in which he shall be tried? He must be indicted, to be sure; but *when* indicted? And what practice is to be adopted in bringing the party to trial, and in the conduction of the trial? Is he to be indicted in form, in *manner, in language, the same as a [252 principal? Certainly not; for the legislature have adopted a distinction between the principal and the accessories, and aiders and abettors; and for that distinction and the various steps and modifications which that distinction pursues from the incipient stage of prosecution to conviction, the court have to resort to the *common law*, because they have no other guide given them. But by that common law, the *principal* is indicted and *prosecuted* in one way, and the aider, abettor, and procurer in another; and the latter can, in general, be convicted only after the principal has been convicted; because on the conviction of the former, as the *substratum*, must the conviction of the latter *rest*. I am aware that what was thought in England as a defect in the common law has been remedied by the *statutes*. How far any of the statutes of England, or the common law of the *realm*, have been adopted, or are considered binding upon this court, as to crimes, or the modes of trial or punishment, I am ignorant. Perhaps there is a discretion lodged in this court to adopt as much common law or English statute law *as may answer the purpose to insure a conviction;* I know not and can not say or conjecture. But *this*, I have ever *supposed* to be an immutable principle in our jurisprudence, *that the court expounded and applied the law as they found it in the code of the state.* If that be a sound principle in our system of justice, the court will have to *create*, *import*, or *borrow some* law, before they can *affirm* as legal, just, and right, the conviction of Anderson on the indictment before them, as an *aider*, *abettor*, and *procurer*.

2. Is the forging or passing a forged "certificate of deposit" a crime punishable by the laws of Ohio?

"Penal statutes ought to be read according to the ordinary import of the language, and if a term would equally admit of two constructions, the one attended with the mildest consequences ought to be adopted." "A check is not, either in common parlance, or in the technical language of the books, called a bill of exchange or promissory note, though it may, in some respects, have the same legal operation." The People *v.* Howell, 4 Johns. 301. There is no need to cite authorities on this point; it is to me so palpable, I should do injustice to my own sense of propri-

ety to inflict citations and quotations upon the court. But, I will ask, is a "certificate of deposit" (the name of a bank instrument of writing much older than the State of Ohio, and as well known 253] as a bill of *exchange or bank bill), "*a contract and promise for the payment of money*," in the language of the indictment? The first count of the indictment, however, calls it by its true name, adding "for the payment of money," and "being for the payment of money."

The allegations in the *indictment*, as they of themselves constitute no part of the law, nor of the facts which constitute the crime, can neither extend nor enlarge the words of the statute, nor contract or expand the name or style of the instrument itself, that it may suit the language of the statute. Is a "certificate of deposit," bearing its name on its face, and described in the indictment as a "certificate of deposit," "in common parlance or in technical language," a contract and promise for the payment of money; "though it may, in some respects, have the same legal operation." Is it any more so than a *bank bill, bank note, or check?* I reckon not; yet the legislature have thought it necessary to enumerate these latter. But, if a bank "certificate of deposit" is, under a penal, and highly penal statute, to be considered a "contract and promise for the payment of money," because it has, "in some respects," the legal operation of the contract for the payment of money, then, indeed, it was needless for the legislature, in the act for the punishment of crimes, to have inserted the words *bond, bank bill or note, check, draft, bill of exchange, promissory note*, and divers other instruments of writing therein enumerated. It would have been better that they should have left the field entirely open, that this court might, according to their enlightened discretion, bring everything which *might* bear the construction of a "contract for the payment of money," in for the *spirit* of the law, under that general clause. However, it must be unnecessary to pursue any further illustrations. "The court sit here to expound and apply the law, not to make it."

Is not an averment of the *scienter* in an indictment against a person for aiding, abetting, and procuring another to utter and publish a forged and counterfeit certificate of deposit *indispensably necessary?* It surely can not be necessary to quote authorities or make an argument on this point. The indictment itself contains that averment against the principal, Stevens. And why not, as to

Anderson? He may be as innocent as a "babe unborn" for aught that appears in the indictment. He is nowhere charged with a knowledge of the *counterfeit character of the certificate of [254 deposit; he is therefore charged with no *crime*. But why need I argue? "This court sit here to expound and apply the law, not to make it."

BELDEN, for the state:

The first objection to said indictment is, that it is no crime, in the State of Ohio, to utter and publish a false, forged, and altered certificate of deposit, knowing the fact. It is contended by the state that a certificate of deposit is a contract for the payment of money; that a suit at law could be maintained on such instrument; that it is covered by the time or contract for the payment of money. With the same force, it might be argued that the forging a due bill is no crime, because it is not mentioned in so many words in the statute.

The second objection is, that the principal had not been indicted. The statute settles that question. The aiding, abetting, or procuring the commission of crime is made punishable without reference to the conviction of the principal.

The third objection seems to have more plausibility. The indictment charges James Anderson of aiding, abetting, and procuring one Geo. Stevens, a person unknown, to utter and publish a false, forged, and altered certificate of deposit; but does not directly aver the fact that he knew it was a false, forged, and altered certificate.

The question is asked, if that be not an indispensable averment, the same averment having been made against the principal? The statute answers the inquiry. In case of principal, the statute makes the *scienter* a part of the crime, or the crime itself, in direct and positive language; but not so in case of an abettor and procurer of the commission of a crime. The legislature understood that knowledge was necessarily included in the language, "shall aid, abet, and procure," etc. Therefore the *scienter* was omitted in the section against abettors. This position is fully sustained in the case of The King v. Fuller, 1 Bos. & Pul. 187.

It would not for a moment be contended that an indictment would be good against an individual for bartering counterfeit bank bills, receiving stolen goods, for harboring a thief, etc., unless

there was an averment of knowledge. The statute requires this; but would it not be ridiculous to aver that A. committed an as-
255] sault and battery, knowing the fact; that he *persuaded and *procured* another to commit willful and corrupt perjury, knowing the fact.

Judge Woon delivered the opinion of the court:

This case presents a single question for our decision. The act for the punishment of crimes, passed March 7, 1836, provides, among other things, "that if any person shall utter and publish as true and genuine any contract for the payment of money or other property, or any acquittance or receipt for money or goods, with intent to defraud, etc., he shall be deemed guilty of forgery," etc. Section 36 of the same act provides, "that if any person shall *aid*, *abet*, or procure any other person to commit any of the offenses, by this act made criminal, every person so offending shall, upon conviction thereof, be imprisoned in the penitentiary, etc.

The draftsman of this indictment has held it sufficient to pursue, literally, the statutory definition of the offense, and, as it does not, in express terms, make a knowledge of the false character of the paper a constituent part of the crime, it was thought unnecessary to aver that fact in the indictment. Is such averment necessary? We are of opinion that it is. The indictment must state every circumstance of knowledge, intention, or action that constitutes the criminal design. It is the intention that gives character to the action, and makes that criminal which would otherwise be exempt from guilt.

There can be no *intention* without *knowledge;* hence the necessity of the allegation, that the accused, in this case, knew that the paper he aided to pass off was a forgery. It must be manifest to every one that Anderson might, with entire innocency, have taken an active agency in obtaining cash for the certificate of deposit in question. He might suppose it to be genuine, and all he did be grounded upon that belief. The statute does not attach criminality to one, who, in honesty and good faith, becomes instrumental in passing off a forged paper. This record charges the fact, that the paper was a forgery, and that Anderson aided Stevens to pass it. No knowledge that it was a forgery; no design to defraud another person, is charged against him; so that, in the terms of

indictment, nothing is alleged against him that can be regarded as criminal. Upon the trial of this indictment, no proof of knowledge or intention to defraud could legally be received; for the prosecutor can not be permitted to prove the constituents of crime, *when he has not set them forth and made them part of his [256 written accusation. The accused is only held to come prepared to meet the specific charge, and when the gist of the offense is knowledge and intention, no proof of either can be received, if there is no averment that they entered into and formed a part of the original transaction.

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PATENT—

1. There can be no legal presumption that a patent for lands has issued from the United States, when the records in the proper offices contain no entry that could be made the foundation of such patent, 249.

2. The operation of a patent is not defeated by an adverse possession of twenty-five years previous to its emanation, 251.

4. A patent issued to an assignee stands on the same footing, as to remedy, as if issued to the party originally entitled, 251.

5. Statute of limitations does not begin to run until a patent has issued, 252.

PLEADINGS—

1. On demurrer, judgment is given against him who makes the first fault, in the pleadings of the case, 231.
2. On appeals from adjustments of damages in constructing the Warren Canal, an issue to the jury must be made upon proper pleadings, 243.
3. Plea in slander, that the words were spoken as a report, and the author named, is bad after verdict, 254.

PRACTICE—

1. If exceptions are not taken to an appeal bond, on appeal from the court of common pleas to the Supreme Court, at the first term after the appeal was docketed, it is held a waiver of the exception, 248.
2. The court may order a new bond to be taken, and upon compliance sustain the appeal, 248.
3. Irregularity in the execution of process does not avoid it, 260.
4. Law of 1834, directing what liquidation of accounts of executors and administrators, shall precede suit against securities, does not apply to suits pending at its passage, 266.
5. Rehearing of a case decided in the court in bank must be allowed in open court, at the term the cause was decided, 267.
6. Note payable to A. B., administrator of C. D., A. B. dies, suit must be brought in the name of his executors or administrators, 270.

PRESUMPTION—

Where the records of the proper land offices contain no indications from which the issuing of a patent can be inferred, no period of possession can warrant the presumption that a patent had issued, 249.

RECITALS—

Recitals in a deed through which a party traces his title, concludes and binds such party, 228.

REHEARING—

Where a suit in chancery is decided at the court in bank no rehearing can be had, unless applied for at the term, and in open court, 267.

RECORDER—

Under the act of February, 1831, an election of county recorder can not be held in anticipation of a vacancy, by the expiration of the incumbent's term, 8.

ROADS—

The legislature has power to assess tolls on the National road, and contractors to carry the United States mail, are subject to the payment of such tolls, 133

SCIRE FACIAS—

1. A joint *scire facias* may be used to revive a judgment against heirs, and to subject land of the decedent, so sold by his administrator as to pass no title, in the hands of the possessor, 12.
2. In *scire facias* on a mortgage, the same defense may be set up that could have been made against payment of the debt it secures, 77.

SCIRE FACIAS—*Continued.*

3. *Scire facias* to revive a judgment may be brought jointly against a surviving party, and the executors and administrators of a deceased party, 168.

SECURITIES—

1. Security for the payment of money can not relieve himself from liability by giving other notice than that in writing required by the statute, 73.
2. Where a debt is due and the creditor agrees with the debtor to receive a part and give time for the residue, the security is not discharged, 74.
3. Suit may be brought against securities in a guardian's bond without previous liquidation of the amount due from the principal, 224.
4. Security sitting up the defense of a written notice to sue, must plead the fact, otherwise he can not avail himself of it on trial, 230.

SLANDER—

It is no defense for uttering slanderous words that they were spoken as a report, and the author named at the time of speaking, 254.

STATUTES—

1. The new enactment of a remedial statute respecting judicial proceedings with a repealing clause in general terms and silent as to suits pending, does not abate such suits, 260.
2. English statute of uses never was in force in Ohio, 275.

TAXES—

1. Lands forfeited for non-payment of taxes in decedent's life, but not sold until after his death, may be redeemed by infant heirs without paying for the improvements made within two years after the sale, 18.
2. No tax amounting to more than four per cent. upon its dividends can be levied upon the Commercial Bank of Cincinnati, 126.
3. A sale of land for taxes, held in the Virginia military district by entry or survey, transfers to the purchaser for taxes the entire right of the original holder. If such holder withdraw the warrants, makes new locations, and obtains a patent, he is a trustee for all the rights acquired under the sale for taxes, 158.

TOLLS—

It is competent for the legislature of Ohio to levy tolls on the National road sufficient to keep it in repair, and to collect such tolls from contractors to transport the United States mails as from others, 133.

TRIAL—

1. Where an accused out on bail pending the trial absconds, the case may proceed and a verdict of guilty be taken in the absence of the accused, 181.
2. Where there have been different verdicts on a contested question of boundary, in a proper case equity may grant a retrial in favor of the party in possession, 181.

VERDICT—

1. A verdict of guilty may be taken in the absence of the accused, who absconds pending the trial, 181.
2. A special verdict upon a question of dedication for public uses, finds an occupation by the county for a court-house and jail, with the assent of the citizens of the town, and adds, "*that in so occupying said property, it was strictly in accordance with the object had in view by the original donors;*" it is a finding of the right in the county, 96.

WARREN COUNTY CANAL—

On appeals from adjustments of damages by arbitrators in constructing the Warren County canal, the trial must be had on an issue made upon proper pleadings, 243.

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## PART II.

ACCOUNT—

The courts of law, in an action of assumpsit, can not appoint a commissioner to adjust the accounts of the parties, except by mutual consent, 63.

ACTION ON THE CASE—

1. In an action on the case against a surgeon for mismanagement in setting and curing a fractured bone, an allegation in the declaration, that the defendants undertook to perfect a cure, must be sustained by proof of a special undertaking; it can not be raised by implication, 124.
2. Action on the case does not lie for injury in grading streets against the officers making such grade, where they act in conformity with the order of the town corporation directing it, 214.
3. An action may be maintained before a justice for a nuisance to real estate, where the damage is under one hundred dollars, 230.

ADMINISTRATORS AND EXECUTORS—

1. Administrators make an arrangement to set aside a contract for the purchase of lands by the intestate, beneficial for the estate at the time, which a change of circumstances would make it more beneficial to have executed. Chancery will not interfere on the application of the heir, 78.
2. Proceedings of the court of common pleas directing the sale of an intestate's real estate by his administrator, may be reviewed on *certiorari*, in the Supreme Court, 140.
3. If the guardian of infant heirs not named in the petition appears on the record for them, they are concluded, 141, 143.

ADMINISTRATORS AND EXECUTORS—*Continued.*

4. Trusts attached to an administrator's conveyance of his intestate's lands sold under an order of court, do not vitiate it, 167.
5. Such sale, though voidable in the hands of the first purchasers, may be absolute in the hands of a *bona fide* second purchaser, 167.
6. Where an administrator's deed contains no words of perpetuity, yet if the sale was in fact made of the whole estate, chancery would so decree it, 169.

APPEAL—

Upon an appeal from an order confirming the sale of mortgaged premises, the final decree adjusting the debt and directing the sale is not opened, 49.

ASSIGNMENT—

1. An assignment of a debtor's effects for the benefit of such creditors as may come in within one year and agree to take *pro rata*, and excluding all other creditors, is invalid, 247.
2. But an assignment for the security of creditors preferred, exacting no delays and imposing no terms, is valid, 248.

BAIL BOND—

The plaintiff waives his appearance bail bond by accepting a plea and taking judgment against the principal before special bail is entered, 210.

BAIL—

1. An affidavit for bail is not to be adjudged insufficient, upon account of nice technical deficiencies, 236.
2. Exceptions to the affidavit for bail must be taken upon the return of process, 236.

BILL OF EXCHANGE—

1. The payer of a bill of exchange *supra protest* for the honor of the indorser, must give reasonable notice that he has made such payment for his credit, otherwise the indorser is not liable to refund, 164.

BILL OF REVIEW—

Bill of review does not lie on a decree in a petition for divorce, 126.

CHANCERY—

1. Chancery will not interfere upon the application of an heir to set aside a beneficial arrangement by an administrator to rescind an unexecuted contract for the purchase of lands by the intestate, where a change of circumstances has made it profitable to have such contract executed, 78.
2. A decree for specific performance will not be made against a vendor, where the parties to a contract, either in express terms or by prompt action, have made time of the essence of the contract, and the purchaser has failed to pay, 92, 99, 200.
3. Answer admits an allegation in the bill and introduces new matter in evidence. Such new matter must be sustained by proof distinct from the answer, 146.

CHANCERY—*Continued.*

4. Where execution is levied upon goods sufficient to pay the debt, and pending such levy, the debtor sells and conveys his lands, and subsequently the plaintiff releases the goods from execution, chancery will protect the land from the lien of the judgment, 148.
5. Equity can not divest the legal title conferred by patent, upon proof that it was obtained by a locator who held the warrant, procured the location, and took possession of the land. There must be proof that the warrant was sold by the owner or by his authority, 208.

CONSIDERATION—

The consideration upon which a mortgage deed is given, is not examinable in ejectment upon it, 71.

CONTRACT—

1. A contract to borrow money for the use of a town made by the corporate authorities, is obligatory, though the act of incorporation contain no express authority to borrow money, 34.
2. A beneficial arrangement by administrators to rescind an unexecuted contract for the purchase of land by the intestate will not be disturbed in equity, 78.
3. In a contract for the sale of lands, punctuality in making or tendering payment is essential to the preservation of the contract for the purchaser, 92, 99.
4. The undertaking of a surgeon to set a fracture, does not imply a contract to cure, 124.

COVENANT—

1. Tenant in dower evicted, can not maintain an action of covenant upon the warranty of her husband, 111.
2. Covenant for rent does not lie upon a lease for lands subscribed and sealed only by the grantor, although the lessee has enjoyed the possession, 151.

DEED—

1. Whether a deed is delivered as an escrow must be determined by the attendant circumstances, 52.
2. A deed of lands is not to be impeached by showing an incompetence to give evidence of the execution by one of the subscribing witnesses, 22.
3. Deed of trust of several distinct tracts of land, with a power to sell, the whole may be sold together, 220.

DELIVERY—

An order to deliver a specified number of barrels of flour out of a much larger quantity, does not effect a change of property until a selection is made, 128.

DIVORCE AND ALIMONY—

Where a divorce has been granted in Indiana, a decree for divorce and alimony can not be made in Ohio, 239.

ENTRY—

A chain of dependent entries must be surveyed strictly as to their calls for distance, 58.

EJECTMENT—

1. In ejectment, a deed delivered as an escrow can not be set up as an outstanding title, 52.
2. In ejectment upon a mortgage deed, the consideration upon which it was given, is not examinable, 71.

EVIDENCE—

1. Where the locality of an entry for land is to be ascertained by surveying a chain of dependent entries, evidence is not admissible to show a loose custom among surveyors of making an allowance of five per cent. instead of employing exact measure, 58.
2. Holding a note payable to A. B. or bearer is *prima facie* evidence of ownership, and the holder may control it as owner, without further proof, 237.
3. Party to a wager is not compellable to give evidence in an action *qui tam* to recover the penalty for betting, 250.

GUARDIAN—

1. Until the relation of guardian and ward is determined, no right of action accrues to the guardian against the ward for advances, 109.
2. After a guardian's accounts are adjusted by the court, and a record made of such adjustment, assumpsit, not debt, is the proper action to recover the balance due, 110.

INDICTMENT—

1. Where there are two counts in an indictment, one bad and the other good, upon a general verdict of guilty, judgment may be rendered on the good count against the accused, 240.
2. An indictment is valid if found by twelve grand jurors, though one of the panel may have misbehaved, 241.
3. The grounds of evidence upon which a grand juror assented to a bill of indictment can not be inquired into, 241.
4. Plea to an indictment impeaching the conduct of the grand jury and alleging facts contrary to the record, is bad, 242.
5. An indictment generally for an assault to commit a rape, need not specify the age of the person assaulted, 244.
6. An indictment for aiding to pass a forged paper must set forth that the accused knew it to be forged, 255.

INJUNCTION BOND—

Where the court order a second injunction bond to be given, and the order is not substantially complied with, the first bond is not discharged, 209.

INSOLVENT LAWS—

A debt discharged under the insolvent laws of the state where it was contracted, and where, at the time of contracting, both parties resided, is discharged in Ohio, 170.

INSURANCE—

A policy of river insurance that contains no clause against barratry, does not cover a loss which has occurred in consequence of the negligence of the master and crew, 25.

JUSTICES OF THE PEACE—

A justice of the peace has jurisdiction to proceed on civil process in a case for nuisance to real estate, where the damages are under one hundred dollars, 230.

LANDS—

1. Lands may be dedicated to public uses without a donee to take title, 136.
2. Trusts attached to an administrator's deed for his intestate's lands sold under an order of court, do not vitiate it, 167.
3. Sale of lands voidable in the hands of first purchasers, may become absolute in hands of a *bona fide* second purchaser, 167.
4. Where an administrator sells the whole estate in fee, but conveys a life estate only, equity will perfect the title, 169.
5. In making sale of lands for taxes, it is sufficient if the collector's or treasurer's return of delinquent lands is verified by affidavit in the form prescribed by the statute, 192.
6. Where no paper is published in the county where the lands lie, it is sufficient to publish the delinquent list in a paper published in an adjacent county, 194.
7. Place of inserting the advertisement in the auditor's record not material, 195.
8. Subsequent overcharge of tax does not affect the sale, 195.
9. Sale of land warrants by the owner, where the patent must issue in his name, is not to be presumed from the fact of holding and locating such warrant obtaining the patent, in the name of the person to whom the warrant issued, and taking possession of the land, 208.

LEASE—

1. In a lease for life, an implied covenant for quiet possession can only be raised by the words *I give*, 68.
2. Where the lessor in a lease only seals and subscribes it, covenant for rent does not lie against the lessee, although he has enjoyed the possession, 151.

LIEN—

Judgment lien is lost where, at the time of the alienation of lands by the debtor, the execution was levied on goods sufficient to satisfy it, and such goods were subsequently discharged from execution by the plaintiff, 148.

LIMITATION OF ACTIONS—

1. All actions and causes of action are barred by the particular statutes in force at the time the right of action accrued, 154.
2. "*Beyond sea*," in the statute of limitations, means out of the state, whether the line of division be of water or of land, 235.

MORTGAGE—

1. Resale of mortgaged premises under a decree ordered, where misapprehension of the rights of the parties interested existed at the time of the sale, 49.
2. The consideration upon which a mortgage is given, is not examinable in ejectment upon the conveyance, 71.
3. Mortgage to secure a debt in installments, no sale of the mortgaged premises can be decreed, until the whole debt is due, 232.

NOTE—

The holder of a note payable to A. B. or bearer is *prima facie* owner, and may control it without further proof, 237.

NOTICE—

Where a bill of exchange is paid *supra protest*, for the honor of the indorser, notice of such payment must be given to the indorser, or he is not liable for it, 164.

OCCUPYING CLAIMANT—

A purchaser of land levied in execution from the judgment debtor, is not entitled to the benefit of the occupying claimant law, 189.

OHIO UNIVERSITY—

The office of trustee of the Ohio University can only be vacated by resignation or the judgment of a court, a legislative appointment to supply a vacancy otherwise conceived is void, 82.

PARTITION—

1. Where tenants in common of separate tracts of land sue for partition, it is regular to make it in entire tracts, 121.
2. A deputy sheriff, summoned by the principal sheriff, is legally qualified commissioner for making partition, and though he act in that capacity, may make the return in the capacity of deputy sheriff, 122.
3. Where a number of individuals claim and hold separately under one tenant in common, they can not be joined in a suit for partition, 131.

PARTNERS—

1. Bond under seal made by one partner, in the name of the firm, binds only the person that executed it, 187.
2. Judgment confessed upon a warrant of attorney under seal executed by one partner of a firm, to be set aside as to the partner who did not execute the warrant, upon motion, 187.

PAUPER—

Where a new township is established, it is charged with the maintenance of the paupers residing within its limits, 174.

POWER TO SELL—

A deed of trust of several separate and distinct tracts of land, with power to the trustee to sell them separately or altogether; a sale of the whole, without objection from either party, is valid, 220.

PRACTICE—

1. A final decree adjusting the amount due, and ordering a sale of mortgaged premises, is not opened by an appeal from an order confirming the sale, 49.
2. Misapprehension of the right of parties, at the time of selling mortgaged premises, may be a cause for ordering a new sale, 49.
3. A deed delivered as an escrow can not be set up in ejectment, to show an outstanding title against the lesser of the plaintiff, 53.
4. In partition, the prosecution of two writs for the same object at the same time does not affect the validity of a partition regularly made upon one of them, 122.
5. A deputy sheriff may act as commissioner in partition, when summoned by the principal, and may also make the return, 122.
6. Bill of review does not lie on a decree in a petition for divorce, 126.
7. Where a number of individuals claim and hold separately under one tenant in common, they can not be joined in a suit for partition by another tenant, 131.
8. Replevin does not lie against a plaintiff in a void process for goods seized under it, 133.
9. Proceedings for the sale of an intestate's lands by administrator may be reviewed in the Supreme Court on *certiorari*, 140.
10. Infant heirs not named in the petition are concluded by the appearance of their general guardian, 141, 143.
11. Answer in chancery admits an allegation in the bill, and sets out new matter in evidence; the proof of such new matter must be made by the respondent, distinct from his answer, 146.
12. Judgment confessed without authority, to be set aside on motion, 187.
13. Plaintiff waives his appearance bail bond by accepting a plea and entering judgment against the principal, no special bail being entered, 210.
14. Chancery does not decree the sale of mortgaged premises until the whole debt is due, 232.
15. A general verdict for the defendant in replevin, upon different and inconsistent pleas, is bad. The verdict should specify whether it is founded on the right of property or the right of possession, 234.
16. Exceptions to an affidavit for bail must be taken at the return of the process. Nice exceptions are not to be regarded, 236.

PUBLIC USES—

1. The construction of a canal by an incorporated company is a public work, for which private property may be appropriated upon valuation, 112.
2. Such valuation may rightfully be made by commissioners, 115.
3. Dedication of lands for public uses is good without a donee to take title. In such cases, a trustee may be appointed by the legislature, 136.

PURCHASER—

1. In family conveyances, the plea of innocent purchaser must be sustained by strong proofs, 89.

PURCHASER—*Continued.*

2. Purchaser of land levied in execution not entitled to the benefit of the law for occupying claimants, 189.

REPLEVIN—

1. Goods irregularly seized by an officer are not in the custody of the plaintiff in the suit, and replevin does not lie against him, 133.
2. A general verdict for the defendant, in replevin, upon different and inconsistent pleas, is bad. The verdict should specify whether it is founded on the right of property or the right of possession, 234.

SECURITIES—

1. Where additional security is given by a sheriff upon the order of court, both sets of securities are liable for the sheriff's defalcations, 224.
2. Securities for a first term are not liable for defalcations in a second, where, upon re-election, the sheriff has proceeded to act without giving security, 225.

SHERIFF—

1. Where a sheriff is ordered to give additional bonds, which are given, both sets of securities are liable, 224.
2. Where a sheriff is re-elected and proceeds to officiate without giving security, the securities for the first term are not liable for defalcations in the second, 225.

SPECIFIC PERFORMANCE—

1. A defendant can not object to specific performance upon the ground of staleness, if the case shows a long continued disability to perform, 88.
2. Where the evidence upon a defense set up against a specific performance is equally balanced, the defense fails, 88.
3. A tender of performance where the party is, at the time of tender, unable to perform, avails nothing, 88.
4. The parties to a contract for the sale of land, may make time of its essence, and where they do so make it, it is to be regarded in a bill for specific performance, 92.
5. Where a contract for the sale of lands does not contain any stipulations, in express terms making time of its essence, yet, if upon a failure to pay the purchase money at the time appointed, the vendor promptly declares the contract at an end, and proffers an equitable adjustment, equity will not decree a specific performance, 99.
6. Where there has been misrepresentation as to the means of payment, in making a contract, and negligence in its performance, equity will not decree a specific execution, 200.

TAXES—

1. It is sufficient if the collector's or treasurer's return of lands delinquent for taxes is verified by affidavit in the form prescribed by the statute, 192.
2. Lands delinquent for taxes in a county where no paper is published, publication may be made in a paper in the next adjacent county, 194.

TAXES—*Continued.*

3. If the advertisement be recorded in the auditor's book of records, the place of inserting it is not material, 195.

4. Overcharge for taxes, accrued subsequent to the forfeiture, does not affect it, 195.

TOWN CORPORATION—

1. A town corporation that borrows money for the use of the town, is liable upon the contract of loan, though no express power to borrow be given in the charter, 34.

2. Officers acting under the order of a town corporation for grading a street are not personally liable for injuries to individuals, if the action is fairly within the authority given, 214.

WARRANTY—

1. A warranty of quiet possession can not be implied in a lease for life, except from the term *I give*, 68.

2. Tenant in dower, if evicted, can not sustain an action of covenant on the warranty to her husband, 11.

WILL—

It is a good republication of a will to call witnesses to such republication, declaring the power to contain the testator's last will, and causing the fact to be indorsed on the will and subscribed by the witnesses, though such indorsement be not subscribed by the testator, 48.

WITNESS—

Party to a wager is not compellable to testify in action *qui tam* to recover the penalty for betting, 250.

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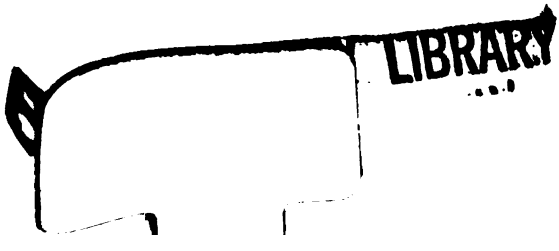
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